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Feb 1 (only one in Appeals)
No. 11286

20,2442
IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

UNIVERSAL PICTURES COMPANY, INC., a Delaware Corporation and CLYDE BRUCKMAN,

Appellants,

vs.

HAROLD LLOYD CORPORATION, a California corporation,

Appellee.

HAROLD LLOYD CORPORATION, a California corporation,

Appellant,

vs.

UNIVERSAL PICTURES COMPANY, INC., a Delaware Corporation and CLYDE BRUCKMAN,

Appellees.

TRANSCRIPT OF RECORD

(In Two Volumes)

VOLUME II

(Pages 273 to 544, Inclusive)

Upon Appeals from the District Court of the United States
for the Southern District of California,
Central Division

FILED
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PAUL P. O'BRIEN,

CLERK

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(Testimony of James Geller)

Q. Oh, there is a difference in connection with it that enters into the box office receipts?

A. That is right.

Q. Sometimes, or very often, stars make very bad pictures, don't they? A. That is correct.

Q. And sometimes people who are unknown make very good pictures? A. That is correct.

Q. And the eventual test is how many nickels roll into the box office; isn't that right?

A. I assume so, naturally.

Q. We have a picture out here that played for five weeks at the Ritz, *Anchors Aweigh*; do you recall that?

A. I do.

Q. Do you think that had any word-of-mouth advertising? A. I beg your pardon?

Q. Do you think that had any word-of-mouth advertising? A. It has.

Q. And the word-of-mouth advertising was responsible for keeping that picture there five times the usual playing time; isn't that right?

A. That is correct.

Q. Harold Lloyd has had bad pictures, hasn't he?
[266]

A. I assume so. I am not familiar with every one of his pictures. I saw a great many of them.

Q. Some of them you thought were pretty good?

A. I thought so.

Q. What do you attribute the succesful—

A. Good at that time. Pardon me. Good at that time. I want to qualify that. For the time it was made, it was good.

(Testimony of James Geller)

Q. Do you have any idea what pictures made by Harold Lloyd grossed? A. I imagine—

The Court: I don't know what the materiality of that is.

Mr. Fendler: Very important element in going into these things, your Honor.

The Court: You said "pictures," didn't you?

Mr. Fendler: Yes, sir.

The Court: All of them?

Mr. Fendler: No, generally what they grossed, the bracket.

The Court: We are only interested in the one picture.

Q. By Mr. Fendler: Do you know what Movie Crazy grossed? A. I have no idea.

Q. Well, in computing the re-issue or re-make rights [267] does not the record of what the picture has done previously have any influence?

A. Not when a decade has passed after the picture was made.

Q. How many years elapsed between the time that Universal first issued Claudette Colbert in *Imitation of Life* and the time it was re-issued by Universal?

A. I imagine quite a number of years.

Q. Ten years is the usual time that elapses between the usual release of a picture and the re-issue, isn't it, ten or twelve years?

A. Is the usual time, you say?

Q. Yes.

A. I don't know that to be a fact at all.

(Testimony of James Geller)

Q. You have never produced any pictures at all, have you?

A. No. I have been connected with them.

Q. You have never distributed any pictures?

A. No, I haven't.

Q. You have never sold any pictures to exhibitors?

A. No.

Q. You have never as a matter of fact had much to do with what pictures paid at the box office, have you?

A. Except as an observer, one being interested in motion pictures. I have been interested in them. [268]

Q. Just like the ordinary layman, isn't that right?

A. No, not like the ordinary layman. I am connected in the amusement industry and I make it my business to learn as much as I can about it.

Q. Will you tell the court how many pictures have been re-issued by Universal within the past ten years?

A. I haven't the figures at all.

Q. Are they available to you?

A. I haven't seen any of them that have been re-issued.

Q. You don't know of any Universal pictures that have been re-issued?

A. Oh, there is undoubtedly some pictures that have been re-issued, including the *Imitation of Life*.

Q. How about the Irene Dunne pictures? Were any Irene Dunne pictures ever re-issued by Universal?

A. I don't know.

(Testimony of James Geller)

Q. You don't know whether the gross on re-issue paid for the advertising or prints of re-issue or not, do you, on the pictures that Universal did re-issue?

A. I have no idea.

Q. You have no basis for testifying, then, that the Lloyd picture *Movie Crazy*, if re-issued, would not pay for the advertising and prints, have you?

A. I have.

Q. Is there available to you, as story editor at Universal, [269] the list of pictures which Universal has re-issued during the past ten years? A. Of course.

Q. And is there available to you the amounts paid for advertising and prints upon those pictures and the amounts grossed?

A. It could be gotten, with a great deal of travail.

Q. Can you get a brief resume without too much travail?

Mr. Lewinson: I object to that on the ground it is utterly immaterial.

Mr. Fendler: It is very important, if your Honor please.

Mr. Lewinson: It is not important at all. You are going into—

Mr. Fendler: In a case where a story editor testifies that the re-issue—I won't argue it. I think it is apparent.

Mr. Knupp: If the court please, they are entirely different pictures.

The Court: I don't want to hear from any of you. The objection is sustained.

Testimony of James Geller)

Mr. Fendler: We offer to show, if your Honor please, by the records which we have requested the witness—

The Court: Mr. Fendler, your questions are directed solely to the qualification of this witness as an expert?

Mr. Fendler: Oh, not at all, your Honor.

The Court: He is offered as an expert. [270]

Mr. Fendler: No. If your Honor please, these questions go to the entire testimony elicited upon direct examination and they go to the entire subject matter.

The Court: It simply goes to the weight to be given to his testimony, as I view it.

Mr. Fendler: But we can also elicit any facts from an agent or officer of the defendant corporation, your Honor. This man is an agent of the defendant corporation.

The Court: He was offered as an expert witness to show that the picture had no value. The questions that were asked were to elicit from this witness testimony for the purpose of showing it had no re-make or no re-issue value; and you have been asking him questions which would tend to minimize his testimony as an expert. If he does not know these things, that is just one of the things he does not know.

Mr. Fendler: But, if your Honor please—

The Court: I have ruled.

Mr. Fendler: May I have an offer of proof, if your Honor please?

The Court: Yes, you may now.

Mr. Fendler: We offer to show, if your Honor please, by the records which we have asked the witnesses to

(Testimony of James Geller)

produce and which he states are in his custody, possession and control, relating to the list of pictures re-issued by Universal during the past ten years and the grosses received therefrom, as [271] well as the costs of advertising and for the prints in re-issue that sums of money in excess of \$100,000 have been realized upon pictures which did not gross anywhere near as much as *Movie Crazy* and which starred people who were nowhere near as important then or now as *Movie Crazy*; and we offer it not only upon the issue of attacking the witness' direct examination but as testimony important to us upon the issue of the value of the re-issue rights.

Mr. Lewinson: To which offer we object on the grounds—

The Court: I have ruled, gentlemen; and on the further ground it is not proper cross-examination.

Q. By Mr. Fendler: Now, Mr. Geller, you testified that the basic feature of *Movie Crazy* has been done many times; that it was not novel; that it had been done by Merton of the Movies and otherwise. Were you aware of the fact that Merton of the Movies had been re-made?

A. Yes.

Q. Recently?

A. It has not been re-made; it has been sold, it has been sold. I don't think it has been re-made as yet.

Q. At least, it has been sold for the purpose of re-making currently, isn't that right?

A. It has been sold for a re-make. I don't know whether they are going to make it currently or keep it in the files. I have no ideas. [272]

(Testimony of James Geller)

Q. What was the price paid?

A. I have no idea.

Q. Do you know when *Merton of the Movies* was first released?

A. I assume—I think I do.

Q. When was it first released?

A. In the '20's sometime as a silent, and it might have been made as a talkie. I don't know.

Q. First made as a silent and then made as a talkie about the same time that the Harold Lloyd picture *Movie Crazy* was made, isn't that right?

A. I don't know. I saw the play as a play. I saw it in 1922, with Glenn Hunter in it, and then it was made by Paramount shortly after.

Q. And then it was re-made as a talkie by Paramount in 1932, was it not?

A. If you say so, I think so.

Q. Now it has just been re-sold as a re-make as a talkie under the title *Merton of the Talkies*, isn't that correct?

A. Well, I don't know. I assume so.

Q. You say that *Movie Crazy* has the same general theme as *Merton of the Movies*, is that right.

A. Yes.

Q. Yes. Well, bearing in mind the fact that *Merton of [273] the Movies* has been made first as a silent picture, then re-made ten years later as a talking picture, and now has just been re-sold, 12 or 13 years later, to be re-made, would you say that the theme has no value at all?

A. That theme has no value. It is not fair to compare *Merton of the Movies* with *Movie Crazy*. The difference in treatment and in writing is not a date. It would

(Testimony of James Geller)

be an insult to Harry Leon Wilson's memory to compare the plot of *Movie Crazy* to the drama and the play and the book of *Merton of the Movies*.

Q. Would it surprise you to know that *Movie Crazy* grossed more than *Merton of the Movies* when they were both released by Paramount within one year of the other?

A. At that time Harold Lloyd was a bigger star than Glenn Hunter, or whoever they put in the picture at that time.

Q. Harold Lloyd is still a star, isn't he?

A. No, he is not.

The Court: Now, gentlemen, you are getting down to an argument.

Mr. Lewinson: May I get the witness' answer to the question?

(Answer read by the reporter.)

Q. By Mr. Fendler: Weren't you aware of the fact that Harold Lloyd is now in a picture, as the star of a picture, [274] being produced, written and directed by Preston Sturgis?

A. I read something in the papers.

Q. Do you recall Preston Sturgis as an important producer?

Mr. Lewinson: That is objected to on the ground it is immaterial. The question itself shows Harold Lloyd has just started production apparently. The testimony is that he had not made a picture since 1937 and it remains to be seen whether he will be a star or a flop in this picture.

Mr. Fendler: If your Honor please, in the first place, I object to counsel coaching the witness; in the second place—

(Testimony of James Geller)

Mr. Lewinson: I object to that observation and assign it as misconduct.

Mr. Fendler: In the second place, I think the question which I asked is perfectly proper, in asking the witness, when he has testified that Lloyd is not in pictures anymore whether a star or otherwise, to ascertain whether he knows what is going on.

The Court: The witness may answer the question.

A. As I understand it, you did not ask me whether he is well known or not. I said that right now he is not starring, and the very fact that he has not made a picture yet, I don't know whether he will be a star.

Q. By Mr. Fendler: Would your answer be the same [275] about Charlie Chaplin?

The Court: Oh, now, that is getting argumentative, counsel: You want to argue with the witness all the time.

Q. By Mr. Fendler: You testified that Charlie Chaplin has re-issued his pictures; is that correct?

A. I said his pictures have been re-issued. I did not say that he re-issued them.

Q. Are you familiar with the amounts received upon the re-issues of the Chaplin pictures?

Mr. Lewinson: That is objected to on the grounds is irrelevant and immaterial.

The Court: Objection sustained—I am going to admit it. He may answer that question, but not as to the amounts, to give an opportunity to develop this witness' information as to sales and he has testified as your expert, and on that ground as to his qualifications as an expert I will permit it.

Mr. Fendler: Will you read the question, Mr. Reporter, please?

(Testimony of James Geller)

(Question read by the reporter.)

A. I am not.

Q. Are you familiar with the amounts received upon the re-issue of anybody's pictures? A. I am not.

Q. Are you familiar with the fact that three Goldwyn [276] pictures have been re-issued within the past year which were made during the early 30's?

A. I am aware of it. I have read in the trade press that he sold the re-issue rights.

Q. You do not know what the consideration was?

A. No.

Q. You do not know what the returns have been?

A. I don't know because the returns are not in yet.

Q. Are you familiar with the fact that Alexander Korda has re-issued all of his pictures?

A. I haven't seen any of them played in town.

Q. You did not know whether they were being re-issued or not?

A. They might be re-issued. I haven't seen them.

Q. Isn't re-issue a matter of very lucrative income to producers, including Universal, and has it not been so well recognized for the past 20 years at least?

A. In my opinion, no.

Q. Well, you don't know what amounts have been received on any re-issues? A. No.

Mr. Fendler: All right; that is all.

The Court: We will take a five-minute recess at this time, gentlemen.

(Short recess.) [277]

The Court: Proceed, gentlemen.

Mr. Fendler: Your Honor, we have with us all of the film which was ordered into court this morning. We have all reached a stipulation and the opposing counsel—

The Court: I am not going to accept any stipulation. There has been too much child's play about these films and I am going to ask the clerk to mark them and impound them.

Mr. Fendler: If your Honor please, there is another print of *So's Your Uncle* available. It is satisfactory to the plaintiff to have the defendant retain possession—

The Court: Well, counsel, I have made my ruling and I am going to impound the pictures as exhibits, as any other exhibits in the case. There has been so much child's play about the handling of these exhibits and so much suspicion aroused as to integrity of the various parties who have had their hands on them, that I am not going to have any more argument about them.

The picture *Movie Crazy* will be marked as exhibit next in order, and *So's Your Uncle* next, and be exhibits in the case.

Mr. Fendler: If your Honor please, may I now ask for a release of your order of impoundment until ten o'clock tomorrow morning in order that the films may be exhibited to a very important witness at the studio this afternoon whom we propose to call in rebuttal? It is a situation where there [278] is apparently just one print of *So's Your Uncle* available.

The Court: If you can make arrangements with the clerk to accompany the picture and be in possession of it at all times I will do it, otherwise I will not.

Mr. Fendler: Both counsel will stipulate it may be done, both of defendants' counsel.

The Court: There has been so much quibbling over that stipulation that I have made my order.

Mr. Lewinson: We will stipulate in open court the order may be vacated.

Mr. Fendler: Thank you, Mr. Lewinson. Will you also, Mr. Knupp?

Mr. Knupp: Yes.

Mr. Fendler: After all, we own *Movie Crazy* and Mr. Knupp's client owns *So's Your Uncle*, and we do not have the slightest suspicion, and never have had, that anything would be done with it. Mr. Lewinson did want to be sure that they were properly identified so that if they had to be used—

The Court: Counsel, you cannot identify a film. All you can do is to mark the box and seal it, and the clerk hasn't any way to tell whether those are the same films in the boxes when they come back as when they went out. Mr. Lewinson raised all these objections and I am going to quiet them right now. I have made my rulings and I am not accepting a stipulation. [279]

Mr. Fendler: If your Honor please, may the impoundment be at ten o'clock tomorrow morning instead of ten o'clock this morning? It is most important to the plaintiff that the film be made available this afternoon and evening.

The Court: I haven't any objection to him impounding them tomorrow morning.

Mr. Fendler: Very well, we will have the films down here tomorrow morning.

The Court: I am going to have them impounded in this case.

Mr. Lewinson: I would like to say for the record, if I may, that I have been entirely misunderstood. I have

not intended to cast any suspicion either on counsel or his client.

The Court: Just a moment; gentlemen, I don't care to hear any explanation.

Mr. Lewinson: I just want to state that for the record, your Honor.

The Court: I just want you to proceed with the case so I can hear the evidence.

Mr. Fendler: May they be removed, then, if your Honor please, and I will have them in here at ten o'clock in the morning? Do you want to have the Columbia film marked?

Mr. Knupp: If the court please, I brought this to court this morning. I think it ought to be marked at the same time or be brought back tomorrow morning, whichever the court [280] thinks proper.

Mr. Fendler: May we defer it until tomorrow?

Mr. Knupp: It is all right with me.

Mr. Fendler: We will take all the responsibility to see that these films are in here at ten o'clock in the morning.

Mr. Knupp: I would like at this time, if the court please, to offer that into evidence—it has never been marked at all—and have the clerk put some kind of a mark on it. I don't care what he puts on it.

The Court: It may be so marked.

Mr. Fendler: No objection.

The Court: I thought it was marked originally.

Mr. Fendler: This is the two-reeler.

Mr. Knupp: No, we have not marked it, if the court please. This is the Columbia picture.

The Court: It will be marked next in order.

The Clerk: Exhibit C; So's Your Uncle, will be marked Defendants' D; and the other picture, Movie Crazy, will be marked Plaintiff's Exhibit 4. The Columbia picture, Loco Boy Makes Good, will be marked Defendants' Exhibit E.

The Court: Are you through with this other witness?

Mr. Knupp: Yes. Mr. Blake. [281]

FOSTER BLAKE,

called as a witness by and on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

The Clerk: State your name, please?

The Witness: Foster Blake.

Direct Examination.

By Mr. Knupp:

Q. Mr. Blake, what is your business?

A. I am branch manager of Universal Film Exchanges.

Q. And for how long have you occupied that position?

A. My present position, two years and three months.

Q. And what is the connection between Universal Film Exchange and the defendant Universal Pictures Company, Inc.?

A. We are the distributing branch of the parent company.

Q. That is to say, the defendant corporation produces the pictures and when they are produced and released they are turned over to you for distribution to the exhibitors?

A. Yes, sir.

Mr. Fendler: Mr. Knupp, may I interrupt to ask for a stipulation that the Universal Film Exchanges, Inc., is

(Testimony of Foster Blake)

a wholly owned subsidiary of the defendant Universal Pictures Company, Inc.? [282]

Mr. Knupp: That is so stipulated.

Mr. Lewinson: Yes. I am delighted to join in that stipulation.

Q. By Mr. Knupp: What territory does your district cover, Mr. Blake?

A. We cover the entire state of Arizona, Southern California from half way to San Francisco southward, and a few towns in Southwestern Nevada.

Q. And that territory has been in your exchange district at all times since you have been manager of the Exchange? A. Yes, sir.

Q. Did you have charge of the distribution of the motion picture So's Your Uncle in your exchange district?

A. Yes, sir.

Q. Have you any records with you, Mr. Blake, showing the revenue derived from the distribution of that picture? A. I have.

Q. Will you produce them?

Mr. Fendler: That is objected to as incompetent, irrelevant and immaterial and outside any issue of damages. On a matter of profits, it would be a piecemeal situation where we would have to call the branch managers in of 17 branches, or something of that sort. It was my understanding, your Honor, when your Honor denied my motion this morning [283] that we were not going into the matter of profits at this time.

The Court: I understood that if it came to profits, it was intimated that you probably would be able to stipulate as to the profits of the picture; if not, that it would be referred to a special master.

(Testimony of Foster Blake)

Mr. Knupp: That was not my purpose, if the court please. The purpose I had in asking this question was to indicate to the court the relative extent to which this picture was produced or was distributed in comparison with other pictures.

Mr. Fendler: Objected to as immaterial and incompetent and outside of the issues.

Mr. Knupp: The question of whether or not the distribution of this picture may have affected the re-issue or re-make rights of the plaintiff's picture is directly affected by the extent to which this picture has been distributed. I was attempting to show by this witness, comparatively, the distribution of this picture and other pictures which were distributed at the same time.

Mr. Fendler: You may have a situation, your Honor, where, in Southern California, the distribution was very slight and in New York it was very great; and unless we are going to have the whole picture presented, why, a piecemeal picture is of no value. And we object to it as outside of the issues in the case. [284]

Mr. Knupp: Yesterday, your Honor—

The Court: Just a moment, gentlemen. I do not care to hear any argument. One set of experts or one expert says it is not worth anything and the other says it is worth three or four hundred thousand dollars. I am going to hear all the evidence. The objection is overruled. I realize that he can only testify as to a limited territory.

Q. By. Mr. Knupp: How many exchange districts are there in the United States?

The Court: The court will be the judge of the weight of it.

(Testimony of Foster Blake)

Mr. Knupp: Withdraw that question. Will you answer the last question, Mr. Blake?

Will you read the last question, Mr. Reporter?

(Previous question read by the reporter.)

Q. Have you that record with you?

A. Yes, sir (producing paper).

Q. I show you the record which you have handed to me, Mr. Blake, and ask you if that record is kept in the regular course of your business?

A. Yes, sir.

Q. It is part of your regular business records?

A. The regular report we get from the home office every two weeks showing the cumulative revenue on a few pictures. [285]

Q. Can you determine from that what revenue was derived from this picture in your district?

A. Yes, sir.

Q. How much?

Mr. Fendler: Just a moment. Object to it, if your Honor please, upon all of the grounds previously stated; and upon the ground that the revenue derived in this district is of no possible aid to the court in fixing either damages or profits. If all the revenue from all over the country or all over the world is brought in—

The Court: I am having difficulty in following you, Mr. Knupp.

Mr. Knupp: My only purpose in this, if the court please, is to show that this picture returned less revenue and was distributed in fewer theatres than apparently any picture that Universal exhibited during that same year.

(Testimony of Foster Blake)

The Court: I know, but you have already entered into a stipulation of the number of theatres that it has been displayed in.

Mr. Knupp: That is right. But the court has no information as yet as to how many theatres the Class A better pictures are displayed in; and that is the only purpose of this evidence, to give the court a comparative view of those two features. I wanted to show to the court that this picture was distributed in fewer theatres or comparatively [286] fewer theatres than any other picture, and that it was distributed in fewer theatres than the better pictures of Universal were during the same year or during the same time, as indicating the lack of possible effect upon the re-issue or re-make rights of the Lloyd picture.

Mr. Fendler: Unless we had a complete picture, it would be of no value, your Honor.

The Court: Does this cover just this district?

Mr. Knupp: It covers just this district, if the court please. But I understood yesterday that Mr. Fendler was contending that this was an average district. I don't know whether—

The Court: I had not heard that.

Mr. Knupp: I am perfectly frank to say to the court that this witness won't know whether the same ratio of distribution existed in other distribution districts as in this.

The Court: Gentlemen, I have in mind that I want evidence, if you cannot stipulate to it, on the extent to which the Columbia picture was exhibited or was distributed.

(Testimony of Foster Blake)

Mr. Knupp: Yes. That is what we are trying to ascertain now, if the court please.

The Court: What is that.

Mr. Knupp: That is what we are trying to ascertain this morning. I think we will have it this afternoon.

The Court: I am going to admit this evidence for what [287] it is worth. I don't know whether it is worth anything or not.

Mr. Knupp: What was the question?

(Record read by the reporter.)

Q. How much revenue did this picture return, Mr. Blake? Will you determine that from your records?

A. This picture returned \$9160.00 in this territory.

The Court: Over what period of time?

The Witness: From the date it was released until it was taken from service.

Q. By Mr. Knupp: What was the date of release?

A. December, 1943.

Q. That was the date of first release?

A. Yes, sir.

Q. And what was the date when you say it was taken from circulation? A. April of this year.

Q. Will you state from your record what was the greatest amount of revenue returned by any picture that you circulated?

Mr. Fendler: Objected to as immaterial; it is outside of the issues in this case. There is no question about this picture being a B picture, and obviously A pictures return more money. It cannot be of any help to the court in determining profits or damages. [288]

(Testimony of Foster Blake)

The Court: In how many theatres was this picture displayed?

The Witness: In how many theatres was So's Your Uncle displayed? According to this record, 241 theatres, at a slight variance with the figure that I got from our own local records. This is from the home office.

Q. By Mr. Knupp: What about the Class A pictures or other pictures that were distributed by you?

The Court: Counsel, I think the objection to that is good. Whether it has produced anything or not would not determine anything. The damage, if any, sustained by Lloyd would be the extent to which the public saw this picture So's Your Uncle. It might have been furnished free along with the purchase of some other picture or something of that type.

Mr. Knupp: That is correct. I was asking the witness now the number of theatres in which these other pictures were exhibited so that the court would have some standard of comparison.

The Court: Can you answer that, Mr. Blake?

A. Yes, sir. A picture released right at the same time, which was an A picture, played in 481 theatres; in fact, it is the same picture with which So's Your Uncle played Los Angeles as the B picture, the second picture.

Q. By Mr. Knupp: What was that other picture?

A. His Butler's Sister. [289]

Q. How many weeks did that play in Los Angeles?

A. Three weeks first run in the Hillstreet and Pantages theatres.

(Testimony of Foster Blake)

Q. Out of those three weeks how many weeks did So's Your Uncle play?

A. So's Your Uncle was the second picture during the second week of that engagement.

Q. I show you this printed matter, Mr. Blake, and will ask you if you will identify that?

A. That is known as a press book and it happened to be a press book covering the picture So's Your Uncle.

Q. Just what is a press book?

A. A press book is issued to assist the theatre men in advertising, exploiting, selling the picture to the public. It contains material to plant with the newspapers; it contains pictures of the advertising material, both newspaper ads and posters; and the theatre men can order the advertising material from this catalog.

Q. And it contains such material, I assume, as you think is best indicated to produce the best box office results?

A. That is right.

Q. That is what it is intended for, is it not, Mr. Blake, to induce the public to come to the box office to see this particular show?

A. Yes, sir. It outlines the studio suggestions that [290] are to sell your picture.

Q. Is this the complete press book?

A. This is complete and entire.

Mr. Knupp: We will offer this into evidence, if the court please, as our next exhibit in order.

Mr. Fendler: Objected to as incompetent, irrelevant and immaterial, and outside of the issues in this case.

The Court: Objection overruled; admitted.

The Clerk: Defendants' Exhibit F.

(Testimony of Foster Blake)

Q. By Mr. Knupp: Mr. Blake, did you see the plaintiff's picture *Movie Crazy*? A. Yes, sir.

Q. And you have seen the defendant Universal Picture Company's picture *So's Your Uncle*?

A. Yes, sir.

Q. Have you an opinion as to the re-issue value of the plaintiff's picture?

The Court: Counsel, there is nothing to show that this man has any qualifications in that respect.

Mr. Knupp: He is an executive, if the court please, engaged in the business of selling motion pictures. He knows what it takes to sell a motion picture.

The Court: All right; I will listen, but I want to say frankly that unless more facts develop, I might as well testify myself to what I think is the value. [291]

Mr. Knupp: I beg pardon, your Honor?

The Court: I say, anybody might testify to that as far as its weight is concerned. You may proceed.

Q. By Mr. Knupp: Did you testify, Mr. Blake, about how long you had been in this business of selling motion pictures?

A. I have been selling motion pictures for 18 years.

Q. And you have been doing that work exclusively?

A. Yes, sir.

Q. And when you say you have been selling motion pictures you mean you have had to go out actually to the exhibitors and sell them? A. That is right.

Q. Point out the features of the pictures that you thought would sell? A. That is right.

Q. Have you dealt with any re-issue sales?

A. Yes, sir.

(Testimony of Foster Blake)

Q. Have you an opinion as to the re-issue value of this particular picture of plaintiff's?

Mr. Fendler: Just a moment, if your Honor please. I desire to examine the witness on voir dire. I object for the purpose of the question on the ground that no proper foundation has been laid.

The Court: You can develop that on cross examination, Mr. [292] Fendler.

Mr. Fendler: I beg your pardon?

The Court: I say, the weight to be given to this witness' testimony is for the court, and I will permit you to develop it on cross examination.

Mr. Fendler: Very well.

Mr. Knupp: Did the witness answer the question?

The Reporter: No.

(Question read by the reporter.)

Q. By Mr. Knupp (Continuing): Entitled Movie Crazy? A. I have my own opinion, yes, sir.

The Court: Just a moment. Have you ever had anything to do with the sale of pictures, for instance, like where Harold Lloyd owned this picture and the sale of it to another studio?

A. No, sir. I am only selling pictures to theatres.

The Court: Then you would not know anything about the actual value of what your company might view as the value of that picture in buying it or in the sale of one of its own films, would you?

The Witness: That is probably right, excepting that I am under the impression that the value that can be obtained from the theatres has a lot to do with the amount that a company would pay for the re-sale or re-issue rights of the picture. [293]

(Testimony of Foster Blake)

The Court: In other words, all you are testifying to is as to whether there would be a demand from the public, which, of course, is a matter that induces the producer to buy a picture.

The Witness: That is right.

Mr. Knupp: Will you read the last question?

(Last previous question and answer read by the reporter.)

Q. And what is that opinion?

A. I don't believe that the re-issue of Movie Crazy at this time would be particularly profitable. I don't say "profitable". What I mean is that it would not sell particularly well.

Q. Well, you say "not particularly well." Do you have any idea about what value might attach to the re-issue rights?

Mr. Fendler: I beg your pardon: Just a moment.

The Court: Counsel, he has testified that he does not know what the re-issue rights are. On account of his testimony, all that he could testify to, as I understand the testimony, is that he, in his opinion, does not feel that it would be salable to the theatres in his particular district.

The Witness: Right.

Mr. Knupp: Well, I think, if the court please, that is the one thing that would determine the question of re-issue rights, as to whether or not the man who bought the re-issue rights could sell the picture on re-issue to theatres. [294]

The Court: Well, anybody who saw So's Your Uncle and then says that Movie Crazy hasn't any real sales value, I am interested in his testimony.

(Testimony of Foster Blake)

Q. By Mr. Knupp: Mr. Blake, do you have an opinion as to whether such sales value as the picture *Movie Crazy* might have has been in any way affected by the production and exhibition of the defendant Universal Company's motion picture entitled *So's Your Uncle*?

Mr. Fendler: Objected to upon the ground the witness is not qualified to answer.

The Court: I don't see any qualification.

Mr. Knupp: The question is—

The Court: However, gentlemen, I am going to admit this testimony. There is a conflict in theories and I am going to admit the testimony. If Mr. Fendler's theory of the damages is correct, I am the one who has to fix the damages. And we have the usual situation here where somebody says: "I stole your house but it wasn't worth anything, anyhow, so you haven't been damaged." And the other fellow says: "Well, the house is worth"—or testifies that, "in my opinion it is worth a good deal more than it would cost to replace it or its value." And it is going to be the responsibility of the court to arrive at some figure, if his theory of establishing the damages is correct.

I am willing to listen to all the testimony that you [295] have, if we have to stay here until ten o'clock at night to listen to it.

I want to say that it is rather surprising to the court to hear somebody come in here and say something is worth \$400,000 and the other fellow comes in on the other side and says it is not worth anything. I am looking for some witness who can approach the matter in what I think a more sensible manner than either side has.

(Testimony of Foster Blake)

Mr. Knupp: Do we have a question pending, Mr. Reporter?

(Question read by the reporter.)

A. I don't think it has—

Mr. Knupp: Just answer yes or no, Mr. Blake.

A. Yes, or I do not think it has been damaged, sir.

Q. And for what reason?

Mr. Fendler: We object to that and ask the objection to be deemed interposed before the previous answer.

The Court: Objection overruled.

Mr. Fendler: Specifically, that this is an invasion of the province of the court as to the question of damage. I want to make—

The Court: You are raising the same objection that the other parties had.

Mr. Fendler: No, sir.

The Court: Just a moment. I have ruled.

The Witness: May I have the question? [296]

Q. By Mr. Knupp: Will you state your reasons for your last answer, Mr. Blake?

A. The elements that we deal in, the values to sell a motion picture are star value and that sort of thing. I do not believe that the sequence in question has anything importantly to do with the sale of that picture *Movie Crazy*.

Q. Had you finished that explanation, Mr. Blake?

A. Yes, sir. If the picture were re-issued—well, I haven't, either. If the picture were re-issued, I believe that, naturally, it would be sold as a Harold Lloyd picture, and I believe it would sell just as well or just as badly regardless of *So's Your Uncle*.

(Testimony of Foster Blake)

Q. Have you an opinion, Mr. Blake, as to what proportion of the profits earned by So's Your Uncle may have been contributed or may be charged or attributable to this particular sequence?

Mr. Fendler: Now, just a minute.

Q. By Mr. Knupp: Involving the magician's coat?

Mr. Fendler: Now, if your Honor please, we are getting into the precise question I understood your Honor excluded. That was the reason I made this motion this morning.

The Court: Counsel, it is hard to be consistent with counsel themselves not being consistent, and I am not certain that my rulings have been consistent. If they had been throughout this case I would be surprised. [297]

Mr. Fendler: In this particular instance we object to the question as asking this witness to allocate what proportion of the profits of a picture is due to a certain sequence. Now, that is the question which I understood your Honor was going to refer to a master. In any event we object to it.

The Court: No, I am not going to refer that to a master because that is the element of damages. That is the question for the court to pass upon, after we determine the profits—what proportion, if any, that the plaintiff is entitled to recover. The general rule on these cases has been 20 percent.

Mr. Fendler: If your Honor please, your Honor is talking about "profits." I am talking about damages. Profits are not a measure of the damages. Now, I understood your Honor to say that you were going to hear testimony—

The Court: I am.

(Testimony of Foster Blake)

Mr. Fendler: —on damages, but you were not going to hear testimony about profits.

The Court: I am not.

Mr. Fendler: If there was a question about profits, that was going to be referred to a master.

The Court: The question of profits is going to be referred to a master.

Mr. Fendler: This witness is being asked to allocate— [298] in fact, he is being asked to allocate what proportion of the profits are attributable to this sequence.

The Court: Mr. Fendler, let him answer the question. It is easier to let him answer the question than to argue with you gentlemen. It is going into the record and if it comes to a question of profits it is going to be referred to a master, anyhow.

Mr. Fendler: I can be hung by the thing that goes in.

The Court: Now, you can't be hung, because I want to say right now as far as this witness' testimony, with his qualifications, that his testimony has practically no weight as to the issues involved and I am just listening.

Mr. Knupp: Would you read the last question?

(Last question read by the reporter.)

A. I do not believe I am qualified to answer that.

Mr. Knupp: That is all.

The Court: I do not care to hear any cross examination, Mr. Fendler, of this witness.

Mr. Fendler: Very well, sir.

Mr. Knupp: That is all, Mr. Blake.

The Court: Gentlemen, I am interested, insofar as expert testimony is concerned, in that of these men that deal in these pictures and who actually have the handling

of them, either the brokers or the officials of the company who actually have the handling of the sale of films, older films [299] that are being re-issued or revamped. That is the kind of testimony that I am interested in—in something that will have some weight with me.

That is no reflection on this witness. I do not mean that. But I just do not feel that his testimony helps me and I am asking for help.

Mr. Knupp: I thought, if the court please, that a man who was actually engaged in the sale of pictures to theatres would be the best informed man on earth as to what the value of these re-issue rights were or what he could get when he sold these pictures. I think the rest of this testimony may be theoretical, but I think a man who has actually engaged from day to day in the sale of pictures is the man who actually knows best what he can sell.

The Court: I would not expect anybody connected with the defendant corporation to admit that there had been any damage at all; I would not expect them to. But I have been interested in testimony of people who are engaged in this particular business who can be of some aid to the court.

Mr. Knupp: Well, your Honor, that is what I thought this witness would be. That is the reason he was produced.

Mr. Fendler: If your Honor please, we desire to cross examine Mr. Blake on some matters which we feel are very pertinent, which were brought out on direct examination.

The Court: All right. I denied you that privilege. [300] The witness will be recalled for the purpose of cross examination. I thought when I—

Mr. Fendler: No, not on the expert testimony. I am going into some of the other matters that he testified to.

Mr. Knupp: I think, if the court please—might I say just one thing? I think in connection with this whole question of damages we are in much the same situation as the plaintiff is here. I do not think that either party was really prepared on this question of damages, because we assumed that it would not be gone into on this hearing. I do not think that either of us has really had a fair opportunity to produce the sort of expert testimony that we could if we had known in advance that the court was going to take evidence on that particular question. We are just in exactly the same position that the plaintiff is in that regard.

After all, it is a question of getting these people together and getting them to see these pictures; and when we only find out at the last moment that evidence of that character will be heard, it is very difficult for us to secure the kind of evidence that we should like to present to the court.

The Court: I will say this: That the court is not going to deprive either side of having their full day in court. If you feel that you are not prepared to answer this issue, all right. I understood from the first of the week [301] that you were prepared to go on with this issue, except the question of accounting.

Mr. Knupp: Both the questions of damages and accounting, if the court please.

The Court: In other words, you understand, the court wants all the evidence that it can get which may help it to arrive at a fair conclusion on this element of damages. While I am not making any final decision in the matter until you gentlemen have had an opportunity to brief the matter, my present state of mind is that there is liability here and that that liability, under the evidence, covers such a range that it is presenting a very difficult problem to the court, and the court would like the aid of those who can help it.

I realize that you gentlemen are at a disadvantage, and I am also at a disadvantage because I am not well informed as to the industry involved. I am not familiar with this question of the re-makes and the re-issues, etc., and there are those in the industry who are and who should be able to give the court real aid.

The only witness, so far, that I can recall at this moment who has had a broad comprehension of the industry is Mr. Lloyd himself. I realize that he is the plaintiff and an interested party, and these employees of Universal are virtually in the same position.

If there is such a thing as disinterested witnesses in [302] the industry, that we do not feel they are bound one way or the other but can give the court their frank, honest testimony on the questions of the re-issues and the practice in that regard, and the re-makes and the practice, and the salability of films that have been out for ten years and have been in cold storage since then, I would like to have that aid. I know as a matter of common knowledge that these films are retained and are considered valuable to producers. They do not know when they may use them or some parts of them again. I know

that it is their stock in trade like a lawyer's library, in a way.

Mr. Knupp: That is exactly our position, if the court pleases. We cannot, of course, expect anybody to testify in connection with this matter except those who have seen the picture; and we have had difficulty, in the very short time we have had, in getting the people that we should like to have gotten to have seen the picture and also come in and testify at this time. So I do not think that either side is going to make a fair representation on that essential question of damages on the testimony that either of us has at hand at this time, if the court please. I am perfectly frank in that.

Mr. Fendler: I think, your Honor, that is the reason for the motion which I made this morning, that the matter of liability be determined first and then your Honor refer the entire matter to a special master, under your supervision and [303] guidance and so on.

The Court: Counsel, I never have been happy with the findings of a special master on the question of damages which are more or less intangible in a way.

Mr. Fendler: I was going to say this, your Honor—

The Court: I prefer to hear that evidence myself, and I will refer the matter of accounting to a special master.

Mr. Fendler: All right. Will your Honor hear my suggestion? There are in the city very outstanding motion picture lawyers: Loyd Wright, Neil McCarthy, former Judge Pacht has had considerable motion picture experience, Henry Herzbrun, former resident counsel of Paramount. Now, I am just making this suggestion in the desire to try and get the fairest picture before whoever is going to hear it. If it is agreeable to the

court, and counsel want to select any of the people that I have suggested, or any other men in the town who have written books on moving picture law, there are probably ten or twelve such men.

The Court: Mr. Fendler, I have made myself clear that on the question of the actual damage I am going to hear the evidence. As to the matter of accounting, when the time comes, I will refer it to Mr. Head as special master for that purpose.

Mr. Lewinson: May I be heard a moment, your Honor? Mr. Fendler has really made two suggestions. The first suggestion is that the issue of liability be heard first. Now, I think [304] Mr. Knupp and I are both in agreement that that suggestion is well taken and we acquiesce in it. The rest of the suggestion is not necessarily germane to the first part of it. I confess that until we came into court on Monday both Mr. Knupp and I were under the impression and had the definite understanding that only the issue of liability would be tried at this time. The result is that the preparation on the matter of damages has had to be—

The Court: I will settle that, gentlemen. I am going to hold there is liability.

Mr. Lewinson: You are going to hold before we have completed the case, your Honor?

The Court: The evidence I have heard up to this time, and so far all the evidence I have been hearing is on the question of damages. You have not offered any evidence on liability.

Mr. Lewinson: I thought I offered some and I expect to offer others.

The Court: Gentlemen, let us proceed.

Mr. Lewinson: Your Honor does not intend to have briefs on that subject?

The Court: I have read your briefs and I have given it considerable thought, and I do not believe that the law will justify the taking of a sequence the length of this out of one picture and inserting it into another picture; that the law is going to uphold that unless it is in the public domain. [305] And I just do not—

Mr. Lewinson: Of course, your Honor will decide the case, naturally, as you are advised, considering the law and the evidence. But if your Honor would—

The Court: I thought that we had gotten down to the point and the only thing that we were now offering evidence on is the question of damages.

Mr. Lewinson: We have other evidence on the question of liability. And if the course is followed that Mr. Fendler has suggested, that your Honor make an interlocutory judgment as to liability—which I hope you won't—after the argument we would like to have an opportunity of reviewing that so that that can be determined before vast expense is gone to on the question of developing evidence as to damages and accounting. But, again, that is in your Honor's hands. We can only suggest.

Mr. Knupp: I do not think, if the court please, that your Honor is going to get a very fair picture on this question of damages on the evidence that either side is going to be able to develop right now.

The Court: Then there is no occasion to proceed further on the element of damages, because I do not wish

to pass on that until I have had all the aid that both sides can give me. I want to try to be as fair to all parties as it is possible to be.

Mr. Abeles: Your Honor, as far as Universal is concerned [306] in appealing from the interlocutory decree, your Honor, we assume, probably would decide on the question of liability, depending, of course, on the future evidence. At the same time, we would like to take up the question, which we believe is quite settled, that there cannot be damages in an action of this nature. In other words, there can't be damages with the type of testimony of the plaintiff. If you have determined that you can decide a case of this nature on this type of evidence of damages, I would like to take that up at the same time.

The Court: The court wants to pass on it and wants to find out if it is true, for instance, assuming for the sake of argument that the plaintiff's contention is correct, that the film had a resale value, a re-issue value or a re-make value before this picture So's Your Uncle was released and that by reason of that release those riights have been destroyed. If that is not the measure of damages, then perhaps the Ninth Circuit will give us a rule to follow. I am inclined to feel that that is the rule of damages; it is the usual rule, that if we have been injured: What it was worth before and what it was worth after the injury, and the only way we can get that is through experts.

Mr. Abeles: Not on copyrighted property, Judge. It has never been done. The only case in which it has ever been done is the one I pointed out and— [307]

The Court: Gentlemen, it is going to be done in this case.

Mr. Abeles: You see, Judge, what I have reference to—don't misunderstand me saying this—we are going to appeal from the interlocutory decree. I would like to take up the damages at the same time.

The Court: I am going to decide the case all at once. I am going to have the whole thing so that we can have that whole picture and all of you can spend all the money you want on it.

Mr. Abeles: We need perhaps a couple of days for both sides.

Mr. Fendler: I have one rebuttal witness who will take ten minutes. That is the only additional testimony I am going to have.

The Court: Gentlemen, if it goes over it will have to go over until December.

Mr. Lewinson: I think we should have time, your Honor, to develop the testimony in a workmanlike way and, if I may say so, a lawyer-like way on the issue of damages.

The Court: Well, I think so, and I will be glad, in the meantime, to have that question briefed.

Mr. Lewinson: All right. And we have additional testimony on liability, your Honor.

The Court: Then we will take that up at two o'clock, [308] gentlemen. We will adjourn at this time until two o'clock.

(Whereupon, a recess was taken until 2:00 o'clock p. m. of the same day.) [309]

Los Angeles, California, Thursday, September 13, 1945
2:00 P. M.

Afternoon Session.

Mr. Fendler: If your Honor please, Mr. Landau has returned but Mr. Knupp has informed me that they do not have the national distribution figures on the Columbia picture; so I wonder if Mr. Landau may be placed on call?

The Court: As I understood this morning, we were going to have to continue this matter for the purpose of getting expert testimony, and under those circumstances I think that the witness should be excused until further notice.

Mr. Fendler: Thank you.

Mr. Lewinson: May we proceed, then, your Honor?

The Court: Now you may proceed.

Mr. Lewinson: Mr. Larsen, will you please take the stand?

W. W. LARSEN,

called as a witness by and on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name?

The Witness: W. W. Larsen, L-a-r-s-e-n. [310]

Direct Examination.

By Mr. Lewinson:

Q. Mr. Larsen, you live in Los Angeles County?

A. Yes, sir.

Q. How long have you lived here?

A. About 22 years.

(Testimony of W. W. Larsen)

Q. You are a lawyer by profession and a member of the Los Angeles Bar? A. That is correct.

Q. You are not engaged in practice at the present time, however?

A. I have not been for several years.

Q. And you have not been for a number of years last past? A. No.

Q. You are also a magician, are you not?

A. That is correct.

Q. And have been for a number of years?

A. Right.

Q. You supply magicians' props to other magicians?

A. Yes, sir; we are in the manufacturing business.

Q. Prior to 1932 did you know the conditions attached to magicians' performances, with special reference to whether there had been any change from the early acts that magicians gave? [311]

A. Do you mean change?

Q. Well, in other words, prior to 1932 had magicians' acts been combined with comedy routines in night clubs and hotels and on the stage? A. Yes, sir.

Q. The questions I am going to ask you now all relate to conditions prior to 1932, so I won't repeat the date each time. Did you know of an act in which a person who was not a magician was in a magician's coat and attempted to perform magician's tricks and stage business prior to 1932?

A. Yes, sir; all too many times.

Q. In that act did birds and other magician's props come out of the coats?

(Testimony of W. W. Larsen)

Mr. Fendler: Now, just a minute, if your Honor please. I object to the line of questioning as leading and suggestive.

Mr. Lewinson: It is leading. I will withdraw the question and re-state the matter. Of course, I have to attract the witness' attention to the matter.

Q. State whether or not in connection with those acts anything in the nature of magician's props appeared to come out of the magician's coat accidentally?

A. Yes, sir.

Q. And what magician's props appeared to come out of the coat accidentally?

A. Well, ever since I can remember it has been a favored [312] subject for cartoons. Rabbits, doves, billiard balls, flags, cards, eggs drop out of a magician's coat, and particularly of his vest.

Q. State whether or not that applied to the case of the magician wearing the oversized coat or the would-be magician wearing the oversized coat?

A. In comedy, yes.

Q. Prior to 1932 did you also know of any egg and chicken acts?

A. Yes, sir. That goes back before my time. It is the Gannon-Kelley act.

Q. Just briefly, what kind of an act was that with reference to dropping an egg?

A. Usually it is breaking it and the chicken comes out instead of the usual yolk content; and also it is the taking of dozens of chickens out of people's pockets and out of their hats and handkerchiefs.

(Testimony of W. W. Larsen)

Q. Prior to 1932 did you also know of an act which involved rabbits or a rabbit and serving tray?

A. I knew Max Molini very well, starting about the year 1936, and he and others frequently told me of his exploits with the rabbit and a serving cover.

Q. Did you know prior to 1932 of any reputation of general knowledge in the magicians' profession with reference to the dropping of a rabbit upon a serving tray? [313]

A. It is not exactly the dropping of a rabbit on a serving tray.

Q. Will you tell us what it is?

A. It is the secret introduction of a rabbit beneath a serving cover.

Q. Oh, I see. Did you know that prior to 1932?

A. Oh, I have done that myself for 20 years.

Mr. Lewinson: Yes. You may take the witness.

Cross-Examination.

By Mr. Fendler:

Q. What was the occasion when you secreted a rabbit—

The Court: Just a moment. I want to ask the witness a question. Did you ever see this picture *Movie Crazy*?

The Witness: No, sir.

The Court: Did you ever see *So's Your Uncle*?

The Witness: No, sir.

The Court: Did you ever see the magician's coat sequence in a picture?

The Witness: No, sir.

(Testimony of W. W. Larsen)

The Court: The magician accidentally getting, or a person in good faith getting into a magician's coat and having those things crawl out of it?

The Witness: In pictures?

The Court: I say, in any circumstances? [314]

The Witness: I have never seen a movie, your Honor.

The Court: All you have seen is where a magician has been plying his art, have you not?

The Witness: Your Honor, it is a favored subject for cartoons and articles. I have seen that since I was a boy, of the person who does not know magic getting into the magician's coat and things start to happen.

The Court: You may proceed.

Q. By Mr. Fendler: Where did you see that?

A. I have seen it in cartoons ever since I became interested in magic. I have also read magazine articles where it is a favored subject, stories.

Q. How many cartoons in sequence have you seen where a person gets into a magician's coat by mistake?

A. I have not seen things in sequence; just isolated cartoons.

Q. You have seen an isolated cartoon where someone got into a magician's coat by mistake?

A. That I won't say.

Q. In other words, you have seen a cartoon where somebody was in a magician's coat?

A. Someone who is not a magician wearing a magician's coat.

Q. How they got into it you don't know?

A. I don't know. [315]

Q. What happened except for that single cartoon you don't know? A. I don't know.

(Testimony of W. W. Larsen)

Q. Did you perform, yourself, on the vaudeville stage?

A. I performed in hotels west of the Mississippi River.

Q. When you put on a magician's coat it was legitimate, is that correct?

A. I do not wear a magician's coat. They exist only in the figment of popular imagination.

Q. A magician has to wear something, doesn't he, that he secretes the props in?

A. Only according to popular opinion.

Q. Well, the whole theory of a magician's coat is, then, not factual at all, is that right?

A. It was factual about the year 1874, when the first book of magic was written.

Q. But currently and for the past 25 or 30 years, while you have been doing business, the magician's coat is entirely fictional?

A. That is right.

The Court: What kind of coat do you wear?

The Witness: Well, your Honor, last night I performed in the same suit I have on now.

The Court: Well, you had a coat on, didn't you?

The Witness: Yes. I mean you can call it a magician's [316] coat if it belongs to a magician, but there is no secret pocket.

Q. By Mr. Fendler: Are you a member of any magical society?

A. Yes, sir; I am a member of all of them.

Q. Will you name them?

A. The Society of American Magicians; International Brotherhood of Magicians; the Pacific Coast Association of Magicians. I could keep on. Do you want me to?

(Testimony of W. W. Larsen)

Q. That is a representative group that you selected?

A. Yes, sir.

Q. Are you aware of the fact that Harold Lloyd is a member of one or more of those magical societies?

A. Yes, sir. We have attended meetings together frequently.

Q. Have you seen Harold perform magical tricks?

The Court: Well, we are not interested in whether he performs those tricks or not, magician's tricks.

Q. By Mr. Fendler: I am interested in this secretion of the rabbit in the tray. Will you describe what you have done before audiences in secreting rabbits under a cover on a platter?

A. Yes, sir. It is not a tray; it is a cover. I do it with either a cover or a hat. [317]

Q. Now, describe what you do.

A. This is not in my regular program. This is when I am working at fiestas in hotels.

Q. All right.

A. I will go up to a table and with a deck of cards get one party to select out a card. It is placed face down. Then I will either take a cover or a hat and place it over the card. I tell them that if they will think of another card, the card down here will change into the card they think of. I lift it and sometimes that part of the trick works and sometimes it doesn't. Then you close it in an effort to make another attempt, lift again, and there is a rabbit.

Q. Do you usually use a drunk at a table to try that trick with?

A. I have performed before lots of drunks.

(Testimony of W. W. Larsen)

Q. I mean do you usually try and select a drunk for a trick like that?

A. Well, it is fun to work with a drunk.

Q. Have you ever handed a drunk a raw egg when he was trying to knock a fly on his forehead?

A. No, sir.

Q. And seen him take the egg and smash it over his forehead? A. No, sir.

Q. In trying to get the fly? [318] A. No.

Q. Does that sound to you like original comedy?

A. It doesn't sound like a magician's trick.

Mr. Fendler: All right. Oh, I think that is all.

Redirect Examination.

By Mr. Abeles:

Q. Just one or two questions so I know what we are talking about. In the act you have mentioned where a man has an oversized magician's coat—correct me if I am wrong—is that the act where a magician is working legitimately and he has a stooge work with him and through some source or other this fellow gets into a coat that does not belong to him; he has a big, oversized magician's coat; and they are working on the stage; is that the idea?

A. The act of King and his partner used to work that way.

Q. And then the stooge upsets the magician; that is, everything that the magician does the stooge makes comedy of and he knocks his routine.

A. I have seen a number where the stooge comes out of the audience and then begins to upset the magician.

(Testimony of W. W. Larsen)

Q. The stooge comes out of the audience onto the stage, gets hold of the magician's coat, and eventually out of the stooge's coat the sausage comes out, or whatever it may be? [319] A. That is right.

Q. Out of the stooge's coat the sausage starts coming out, birds start coming out, rabbits start coming out, and the whole audience starts laughing because he is imitating the magician's act and giving it away?

A. That is right.

Q. You told me you saw Max Molini work a number. I saw him in Paris and also in New York. Do you remember the act he had where he worked with a stooge waiter; he is dancing around and then a rabbit comes out of his clothes and the waiter is passing and he puts it on the tray?

A. As I first explained to you, I only knew Molini after 1936, but he lived with me for awhile and he told me—

Mr. Fendler: Just a minute. Object to that as hearsay.

The Court: We are not interested in what he told you.

Q. By Mr. Abeles: You have heard that he does that trick, haven't you?

The Court: Just a moment. I have ruled that that is hearsay.

Mr. Abeles: All right; that is all.

Mr. Fendler: Nothing further.

Mr. Lewinson: That is all, thank you.

The Court: May he be excused?

Mr. Lewinson: Yes.

Mr. Adler, will you please take the stand? [320]

FELIX ADLER,

called as a witness by and on behalf of the defendants, having been first duly sworn, was examined and testified as follows:

The Clerk: Will you state your name?

The Witness: Felix Adler, A-d-l-e-r.

Direct Examination.

By Mr. Lewinson:

Q. Your name is Felix Adler? A. Yes, sir.

Q. You reside in Los Angeles County?

A. Yes, sir.

Q. At present you are employed by Columbia Pictures Corporation? A. Yes, sir.

Q. You have had prior employment in the movie industry? A. I have.

Q. You were employed by the Harold Lloyd Corporation when *Welcome Danger* was being made?

A. I was.

Q. And when *Movie Crazy* was being made?

A. Yes.

Q. Prior to going into the movie industry you were in [321] vaudeville? A. I was.

Q. And you were also in burlesque at one time?

A. I was.

Q. How long an experience have you had in the entertainment field, including burlesque, vaudeville and in connection with the picture industry?

A. Forty-five years.

Q. In what capacity were you employed by Harold Lloyd in *Welcome Danger*?

A. As a writer or gag man, as you want to call it.

(Testimony of Felix Adler)

Q. State whether or not you suggested the routine in Welcome Danger which started with Lloyd getting into the magician's coat by mistake.

A. In what way do you want me to tell you?

Q. Was the comic routine in connection with the magician's coat suggested by you or by someone else when it was first made for Welcome Danger?

Mr. Fendler: Just a minute. We object to the form of the question.

Mr. Lewinson: I think the question is proper.

Mr. Fendler: I don't know what is implied by "the comic routine." I don't know whether that is supposed to mean the magician's coat sequence—

Mr. Lewinson: I will withdraw the question. [322]

Mr. Fendler: —as it eventually appeared in the picture Movie Crazy; I don't know whether it was a conversation that took place or what.

The Court: He has not asked him that.

Mr. Lewinson: I have withdrawn the question.

The Court: Proceed.

Q. By Mr. Lewinson: Mr. Adler, I call your attention to the comic routine which appeared in Movie Crazy as it was released, which was made up, among other things, of certain gags and stage business, including an egg or eggs coming out of the magician's coat, birds coming out, mice coming out, the dropping of mice, and certain other things. Do you recall that?

A. I do.

Q. Do you recall that that was first made for Welcome Danger?

Mr. Fendler: Just a minute. We object to it, if your Honor please. Now counsel is leading and suggesting

(Testimony of Felix Adler)

answers to his own witness here. He is assuming facts not in evidence.

The Court: That is an admitted fact, counsel.

Mr. Lewinson: The facts are in evidence and these are preliminary questions.

Mr. Fendler: It is not in evidence, if your Honor please. [323]

The Court: Mr. Lloyd himself testified that that was originally planned to be in *Welcome Danger*.

Mr. Fendler: And in a different form.

The Court: I know, not in the same form, but the general idea.

Mr. Fendler: I don't know what they are talking about, your Honor, and I think we are entitled, for the purpose of clarity, to know just what the scenes and sequences are that the witness is going to say that he wrote or that other writers contributed.

Mr. Lewinson: I can't do it all in one question.

The Court: Objection overruled. You may answer the question.

The Witness: What was the question?

Mr. Lewinson: Read it, please?

(Question read by the reporter.)

A. The magician's coat sequence was.

Q. Can you explain to the court how it happened to be made for *Welcome Danger*?

A. I believe I can.

Q. Well, please do so.

A. We were working on the story of *Welcome Danger*, which starts out with a young fellow who has ambitions, whose father was formerly a police captain who was a great man in tracking down crime, and he had

(Testimony of Felix Adler)

passed away and there was a [324] crime wave going on in San Francisco and they were at a loss to fathom the crime. So somebody suggested: Like father, like son; get his son. And Lloyd was brought over there. And we went on and started doing the story and the surroundings were rather drab. So, looking over the rushes for a long time, he said, "We need some production value in this picture." So I think they put on a dance. He said, "We have got to have some fun in that," and I happened to suggest this. I said "Why don't you get into a magician's coat by mistake and let the fun take its course?"

Q. Can you explain whether there were any antecedents for that suggestion or whether the suggestion came out of your own head without antecedents?

A. Well, years ago I saw a magic act in vaudeville, having played in vaudeville myself, by the name of Martini and Maximillian and Martini was the straight magician and Maximillian was a sort of stooge. And after Martini had done a trick he would hand the prop or something like that to Maximillian and he would give the trick away. And in the course of this he had a suit on and, as he walked away, things used to drop out of his coat.

Then later, I saw Charlie Chaplin in a picture and in this picture Chaplin was an escaped convict and got into a minister's studio. He met a girl and fell in love with her. In the meantime another convict escaped and he insisted upon [325] coming to the house. This Chaplin was trying to reform the other convict and the other convict was trying to steal stuff. So at the table he started taking things and Chaplin would put them back. When Chaplin's back was turned, nearly all the silverware was gone from the table, so Chaplin suspected the other convict

(Testimony of Felix Adler)

had stolen them. So he picked up some object, either the knife or fork or spoon, and did some trick with it and made a couple of passes as if he were a magician, and stuck his hand in the other convict's pocket and brought out a lot of silverware and put it back on the table.

After seeing that and the other thing I explained about Maximillian, those things gave me two ideas and I thought it might be a good idea at the time I saw that in the Chaplin picture, and that that might be a good idea to keep; that we could get something out of it. So when the picture was made I happened to suggest we could get something out of it.

The Court: The sequence was original with you?

The Witness: Those two ideas led up to the subject matter.

The Court: Any idea is based upon that of somebody else that you have known?

The Witness: I always thought so.

Q. By Mr. Lewinson: Had you ever prior to 1932, or prior to 1928 for that matter, the date of the making of *Welcome Danger*, seen on the stage acts in which a person or [326] persons changed into other people's clothes? A. Yes, sir.

Q. Can you mention any celebrated comedy that appeared prior to 1928 in which that occurred?

The Court: Where he put on somebody else's coat?

Mr. Lewinson: Yes.

A. Edmond Hayes in *The Wise Guy*. A vaudeville act afterwards played a similar scene.

(Testimony of Felix Adler)

Q. Would "Charlie's Aunt" be another illustration?

A. Oh, yes. Charlie's Aunt is a well-known farce, where he puts on the costume and masquerades as the aunt.

Q. Referring to some of the stage business in Movie Crazy, and calling your particular attention to the stage business with reference to the fly on the head of the drunken person and an egg being dropped in his hand and then being smashed on the head to knock the fly, prior to 1932, or for that matter, prior to 1928, had you seen anything similar to that in the pictures?

A. Oh, many times.

Q. Can you give one instance?

A. Yes. I remember a two-reeler Mack Sennett made on the old lot on Glendale Boulevard. We had a comedian called "Fat Roebeck." He was sleeping under a tree and the mosquitoes were bothering him, and above him in the crotch of a tree there was a chicken laid an egg and it fell in his [327] open hand. As the mosquitoes were bothering him an egg dropped and he took up the egg and slapped himself in the face and the egg broke in his face.

Q. With reference to the comic business with the knives and forks in the woman's garter as it appeared in Movie Crazy, did you suggest that?

A. I did.

Q. Was there any antecedent to that?

A. Oh, yes.

Q. What was it?

A. There was an old story with a Jewish dialect about it. I won't attempt to go into any dialect. But anyhow, a fellow comes back from a party with his

(Testimony of Felix Adler)

friend and as his friend puts his hand in his pocket he pulls out a lot of knives and forks he collects at his friend's house. The friend says, "Please forgive me. I only did it for a joke." And the fellow replies, "I know, but there was some spoons there, too."

Q. Was that where you got the idea?

A. I got the idea, and also the young lady that played in the part, because I was going with her at the time. I afterwards married her, to my sorrow.

Q. She was the one who took the part?

A. She was the one who took the part.

Q. With reference to the stage business in Movie [328] Crazy which involves the squirting of the water through a flower and then the woman picking up a glass of water and throwing it at the wrong person—do you have that in mind?

A. Oh, yes. We did that at Fox, the old Fox, not Twentieth-Century Fox.

Q. With these knives and forks, this comedy you refer to was prior to 1928, was it not?

A. The knives and forks?

Q. Yes.

A. That is one of the oldest vaudeville monologues.

Q. It was before 1928? A. Oh, yes.

Q. With reference to this water trick that we have referred to, when did you see that and with whom?

A. We have done the water trick coming out of the flower time and time again. At Sennetts', probably nearly every other picture we made, and as far as the "Topper" to it, as we call the "Topper"—

(Testimony of Felix Adler)

Q. That is throwing the water at the wrong person?

A. Well, where the person think somebody holding a glass of water is doing it. We did that at Fox, Benny Stoloff.

Q. Was that prior to 1928?

A. Well, I worked with Fox before I went with Lloyd. Benny Stoloff directed a two-reeler. He is still directing [329] around here, and he made that.

Q. Generally, as to the other pieces of stage business that appear in *Movie Crazy*, had you seen them before?

The Court: I understand he tells me he has never seen it.

Mr. Lewinson: Oh, I beg your pardon.

The Court: Didn't you say you had never seen the picture *Movie Crazy*?

Mr. Lewinson: He said he worked on it.

The Court: I mean the picture itself.

The Witness: That I never saw it?

The Court: Did you see the picture?

The Witness: Oh, yes; I saw it in the projection room.

The Court: All right.

The Witness: I worked on the story.

The Court: I know, but I understood you to say that. I was thinking probably about that deposition I just read.

Mr. Lewinson: Maybe so, your Honor.

Q. Now referring to the other stage business in *Movie Crazy* such, for example, as the string of handkerchiefs that appears, do you recall that coming out of the magician's coat?

A. Just how—I didn't quite understand.

(Testimony of Felix Adler)

Q. Let me put it this way: Prior to 1928 had you ever seen a string of handkerchiefs or anything like that coming out of a magician's coat? [330]

A. Oh, that is a standard trick.

Q. Had you ever seen rabbits? A. Yes.

Q. Pigeons? A. Yes.

Q. Eggs? A. Yes.

Q. Mice? A. Yes. Mice, ducks, geese.

The Court: In that Movie Crazy picture that you worked on, that sequence with the magician's coat, you did not consider that the man there was playing the part of a magician, did you?

The Witness: You mean Harold?

The Court: Yes.

The Witness: No.

The Court: So that he was not the magician making things appear, but it was just because they happened to be in that coat?

The Witness: That is right.

The Court: And he found himself embarrassed by reason of it?

The Witness: Yes, sir.

Q. By Mr. Lewinson: Mr. Adler, do you recall a motion picture Small Town Idol? [331] A. Yes.

Q. Was that made prior to 1928? A. Oh, yes.

Q. By whom was it made? A. Mack Sennett.

Q. What was the theme or idea of that picture, generally?

A. The idea of a country bumpkin trying to crash Hollywood and becoming a success in pictures.

Q. Was that a full-length picture?

A. It was a feature-length.

(Testimony of Felix Adler)

Q. Do you know of any picture in which a person gets a screen test by sending the wrong photograph to the studio? A. Yes.

Q. That was prior to 1928? A. Yes.

Q. What picture is that?

A. Mabel Normand in *The Extra Girl*, a feature-length by Mack Sennett.

Q. And that was made prior to 1928?

A. About '22 or '23.

Mr. Lewinson: You may take the witness.

Cross-Examination

By Mr. Fendler:

Q. You have been employed as a comedy writer or a gag [332] man for how many years, Mr. Adler?

A. Since about 1921.

Q. And for how many years were you employed by Harold Lloyd in that capacity?

A. Well, I don't know how long *Welcome Danger* ran, but *Welcome Danger* was first made as a silent and then we had to put sound in it. I think the engagement ran about 14 months on that one picture. And I thing *Feet First* ran about 10 months and then I worked maybe three months on something else. I kept getting less and less steady employment.

Q. And then did you work on *Movie Crazy*?

A. Yes.

Q. And did you work on any subsequent Harold Lloyd pictures?

A. Yes, sir; *Cat's Paw* and—I don't know what its name is—I believe after that I worked on that *Milky Way*, a part-time.

(Testimony of Felix Adler)

Q. You have worked for Lloyd over a period of ten years, more or less, is that correct? A. Yes.

Q. Did you work on *The Freshman*? A. No.

Q. You have mentioned a lot of things that you contributed to this magician's coat sequence. Did anybody else in the Lloyd organization contribute any suggestions or ideas [333] to the sequence in question?

A. I believe they did.

Q. And who else contributed?

A. Well, I don't know who was on the staff. Mr. Bruckman was on the staff.

Q. Lex Neal? A. Lex Neal.

Q. John Grey?

A. John Grey—I don't know if John Grey was on that picture or not.

Q. Did Vincent Lawrence have anything to do with it? A. Yes.

Q. In fact, Lawrence was given credit for writing the screen play, wasn't he? A. That is right.

Q. Al Boasberg?

A. No, I don't believe Boasberg was on it. He was not on it when I was on.

Q. Allen McNeill?

A. He was there before I came.

Q. Tim Whelan?

A. I don't believe he was on it.

Q. Agnes Johnson? A. I don't know her.

Q. Did Lloyd make any contributions to the magician's [334] coat sequence?

A. I never heard of one.

(Testimony of Felix Adler)

Q. You never heard of Lloyd making a contribution of any kind?

A. I don't believe I have ever heard him make any contribution of any kind on any of the stories. That is what he hired us for.

Q. Did he reject certain material and tell you what was wrong with it?

A. We would give him the stuff and if he didn't like it, he threw it out.

Q. Was material which was created by the writers there photographed and then sometimes re-photographed several times?

A. Oh, yes.

Q. Why was it re-photographed?

A. I imagine the camera angle may have been wrong, or maybe he thought he didn't do it right or something like that.

Q. Do you think the timing of the comedy might have had anything to do with it?

A. Well, timing always has something to do with comedy.

Q. Timing is one of the most important elements in comedy, isn't it?

A. In the silent days, if you are just doing pantomime; but now, things are followed up.

Q. Movie Crazy is a talkie picture, isn't it? [335]

A. It is, yes.

Q. And the timing is still important, isn't it?

A. Well, it is not as important in that type of story as the gags are.

(Testimony of Felix Adler)

Q. You mentioned that the origin of this sequence was because Lloyd said he wanted some production value in that picture?

A. Yes. That was in *Welcome Danger*.

Q. That is right. Does sequence lend any production value to *Movie Crazy*?

A. I don't remember *Movie Crazy* so well any more. I didn't work so long on it. I don't know. I saw it in the production.

Q. Did you and the other writers in working out this sequence here attempt to arrive at a unique combination of situations and scenes, or were you just trying to do something in the same combination and sequence that it had always appeared to the public before?

A. About the same.

Q. But that was your idea? A. Yes.

Q. To have the same combination of scenes and sequence that had appeared previously, is that correct?

A. I believe so.

The Court: You did not try to have anything unique? [336]

The Witness: No. The only thing, I remember I suggested the egg. I don't think the egg gag was in there in 1928, and I suggested it in the 1932 version.

Q. By Mr. Fendler: You mean where the drunk hits his forehead with the egg? A. Yes.

The Court: You people did not try to do any original work, is that correct?

The Witness: Well, it is very hard to do a lot of original work.

The Court: I know, but this was not original?

(Testimony of Felix Adler)

The Witness: This was practically a facsimile to the thing that happened before.

Q. By Mr. Fendler: I mean when you created Welcome Danger did you try and have an original combination of scenes that had not publicly appeared?

A. We tried to get a basic angle once in a while. But, after all, it is hard to do, because I don't believe we ever had a story at any time. We were gag men.

Q. What was the story? What was the story use of this sequence in Welcome Danger? How was the sequence woven into Welcome Danger, into the story?

Mr. Abeles: I object, if your Honor pleases. He has two questions at the same time. I think a proper question would be to ask him the nature of the scenes, but not whether [337] or not it was woven into the story.

The Court: I have heard enough about Welcome Danger, counsel.

Mr. Fendler: There is a whole line of cross-examination, if your Honor please, that—

The Court: All right; go ahead. I am going to stay here if it takes to midnight, until you gentlemen unwind.

Q. By Mr. Fendler: Was the magician's coat sequence woven into the story of Welcome Danger?

Mr. Lewinson: Objected to on the ground it is immaterial.

The Court: You have asked him questions about it and he has testified as to the general theme.

Mr. Lewinson: I will withdraw the objection. I thought your Honor considered it immaterial and that is the reason I made the objection.

(Testimony of Felix Adler)

The Court: I considered it a waste of time but Mr. Fendler thinks it is important. I am going to let him unwind.

Mr. Lewinson: I withdraw it, I withdraw it.

The Witness: What is the question?

Mr. Fendler: Mr. Reporter?

(Question read by the reporter.) A. No.

Q. Did the events and incidents occurring in the magician's coat sequence of Movie Crazy have any relationship whatever to the story or development of the plot of Movie [338] Crazy?

A. I don't think so.

Q. You do not think the fact that Harold Lloyd had all of these embarrassing incidents occur while he was dancing with the wife of the movie picture producer that he was trying to get a job from had any story influence, but had nothing to do with the story?

A. No, I don't believe it, but we knew it was a very funny sequence and we could get laughs regardless. We had tried it out before.

Q. In other words, you knew when you put it into Movie Crazy that it was a rather outstanding sequence as a whole, is that right?

A. It is a funny sequence.

Q. Now, will you come back to the previous question? Do you think the fact that the movie producer's wife was insulted and slapped Harold's face when the water squirted at her, and quite obviously was going to renig upon her agreement to help further his career in pictures—do you think that that had any story influence?

(Testimony of Felix Adler)

Mr. Abeles: Just a moment. That question is objected to on the ground it is complex and argumentative.

Mr. Fendler: Question withdrawn and reframed.

Q. Did the fact that the movie producer's wife was the butt of these things which occurred when she was dancing with Harold on the dance floor have anything to do with the general [339] story which related to Harold trying to get into the moving pictures?

A. Well, I don't know just what you mean by the things that happened to her. If you could enumerate what happened to her?

Q. Don't you know what happened to her in the sequence?

A. You mean where a mouse gets down her back?

Q. The mouse down the back, the water in her eye, the rabbit?

A. She didn't know at the time that Lloyd was doing it?

Q. Why did she slap Harold's face then?

A. I don't recall her slapping his face any more.

Q. You do not recall much about Movie Crazy, do you?

A. Quite a bit. I wrote on it.

Q. You do not recall just how it fitted into that particular picture?

A. Yes, I do to a certain extent—to a great extent.

Q. Well, do you recall the moving picture producer's wife had agreed to introduce him to her husband in order to help him?

The Court: Counsel, I am going to limit cross-examination.

Mr. Fendler: Very well.

(Testimony of Felix Adler)

The Court: I would like to ask this witness a question. The sequence of the magician's coat as set up in *Movie Crazy*, had you ever seen such a sequence before? [340]

The Witness: Well, we did it before in—

The Court: I know, but except as you did it for Harold Lloyd?

The Witness: Oh, you mean on the screen, see it on the screen?

The Court: Had you ever seen that sequence?

The Witness: I had never seen it done before on the screen.

The Court: Had you ever seen it on the stage?

The Witness: Well, I have seen fellows get into coats.

The Court: I know, but in every picture somebody has to walk. It is nothing new that somebody walks.

The Witness: That is right.

The Court: It is nothing new that somebody might be slapped?

The Witness: That is right.

The Court: That is the slapping subject of the idea when you take each one and tear it to pieces, but it is the combination.

The Witness: In running gags.

The Court: Did you ever see that combination of gags, you might call it, or events that transpired in that sequence?

The Witness: Not that particular sequence.

The Court: No.

(Testimony of Felix Adler)

Q. By Mr. Fendler: Mr. Adler, you have been employed [341] at Universal during the last year or two?

A. Yes. I was there, I think, up until last March for about 8 or 9 weeks.

Q. Did you use in any picture written by you at Universal the fight sequence from *Welcome Danger* in a picture entitled *The Naughty Nineties* which has just been released by Abbott and Costello?

Mr. Lewinson: That is objected to—

The Court: Just a moment. Of what materiality is it?

Mr. Fendler: Now, if your Honor please—

The Court: Wait a minute, now. Just a moment. We are only trying one lawsuit at a time and I don't care in this other picture what he did.

Q. By Mr. Fendler: Mr. Adler, did you collaborate with Clyde Bruckman on the writing of a picture at Columbia entitled *Loco Boy Makes Good*?

A. Yes.

Q. Which contains this same sequence?

A. I understand it does, but I don't—

Q. All right. Is this the first time that you ever heard about the Columbia picture, which was written by you and Bruckman containing the magician's coat sequence throughout the second reel?

A. I knew it contained it, but we did not put it in.

Q. Who did? [342]

A. I think Julius White put it in, the producer. When we write over there, we write a story and it is hard to recognize it after we get through.

(Testimony of Felix Adler)

Q. You mean Julius White at Columbia told you and Bruckman that he wanted the magician's coat sequence from the Harold Lloyd picture *Movie Crazy* inserted in that picture?

A. He didn't say from Hadold Lloyd's. He wanted the sequence in, yes.

The Court: How did he designate it?

The Witness: I wouldn't remember anymore. We write a story over there, and the first thing we know there is nothing left of it.

The Court: I know, but that is not the point. You said that he wanted the magician's coat sequence.

The Witness: Yes, something with the magician's coat in it.

The Court: Then you prepared it, did you not?

The Witness: No. We prepare a little bit, and then when he is on the set he changes it around.

The Court: But you saw the picture afterwards, did you?

The Witness: I saw it in the projection room. I don't believe they play around here in Los Angeles. I have never seen a Columbia picture here.

The Court: Did you see the sequence, the magician's [343] coat sequence?

A. Part of it, yes; part of it in the rushes.

The Court: You recognized it as similar to the other one?

The Witness: Yes.

The Court: And did you see the picture *So's Your Uncle*? Have you ever seen that picture?

The Witness: No, I never saw it.

(Testimony of Felix Adler)

Q. By Mr. Fendler: But you knew when you wrote it and were present on the set when *Loco Boy Makes Good* was being photographed?

A. I never was on the set.

Q. I understood you to say that it was partly written on the set.

A. I saw some of the rushes, I said.

Q. You do recall, don't you, that after Julius White requested you to insert this sequence, you and Bruckman did write the general outline of it?

A. Yes, made a lot of changes in it, too, put a dance in the center and things like that.

Q. You felt that there was a substantial difference between the sequence as it would be in *Loco Boy Makes Good* and as used by Harold Lloyd in *Movie Crazy*, is that correct?

A. I couldn't tell. I saw some of the rushes. I really have never seen *Loco Boy Makes Good*, so I don't know what is in it. I know the boy gets into the magician's coat. [344]

Q. That was written by you and Bruckman with full knowledge that it had been in the Harold Lloyd picture *Movie Crazy*?

A. Oh, yes.

Q. And Julius White, the producer-director of the picture, knew it as well, is that correct?

A. I don't know.

Q. He told you to put it in, you said?

A. Well, that is what he said, yes.

Q. You had discussed with him the fact that that was in *Movie Crazy*, had you not?

A. No.

(Testimony of Felix Adler)

Q. How did you and Julius White arrive at the creation of that particular sequence for your Columbia picture?

A. Julius White sees every picture in the world, every comedy picture any place. All the writers in any one field, it is already common property and it is a lot of exchange of gags. All comedians do it, Stan Laurel, Laurel and Hardy, all the comedians do the same gags.

Q. You mean that all comedians in the business steal—not individual gags but a continuity of 50 or 60 continuous consecutive scenes—out of each other's motion pictures; is that what you mean?

Mr. Lewinson: Wait a minute. I would like to have the question read. [345]

The Court: Well, I am going to direct the witness not to answer it. It is argumentative.

Mr. Fendler: All right, that is all.

Mr. Abeles: Let me just ask you a couple of questions.

Redirect Examination

By Mr. Abeles:

Q. Now, if you had a story and it comes to a part in the story where you want to work in comedy, you want to work in what you call a gag and stage business, you tie it into the story, don't you?

A. That's right.

Q. There is always a trick of tying it in?

A. Yes.

Q. But your story keeps going along, is that right?

A. That is right.

(Testimony of Felix Adler)

Q. So that in two different pictures you can have two different story lines going along and this comedy can be tied into the story line? A. I believe so.

Q. You mentioned before that these sort of things like gags and stage business were common property. Do you recall the old burlesque days? A. I do.

Q. In fact, I will take you back to the medicine man. [346] Do you remember the medicine man?

A. I used to do medicine shows.

Q. Didn't they used to do all this comedy, different comedy sequences and so-called gags? A. Yes.

Q. And every medicine man would do it?

A. Yes.

Q. And in burlesque isn't it a fact that for years and years every comedian did practically the same sort of sequence, as we call it, or stage business?

A. That is right.

Q. In fact, like the old Flugel Street gang. Do you remember the old Hood and Ward sequence?

A. Where they borrow the hose?

Q. Yes. A. Yes.

Q. They would go through a long story; they would build up and build it up and build it up?

A. That is correct.

Q. And different teams built it up more to go with their own style? A. They did.

Q. One man would add something and one man would add something else or take something away, isn't that correct? A. That is right. [347]

Q. You have always considered these gags, stage business, common property? A. That is correct.

Mr. Fendler: Wait a minute, wait a minute.

(Testimony of Felix Adler)

Mr. Abeles: You opened it up.

Mr. Fendler: No, I did not open up that question. We object to the question as to whether or not he considered it as common property, as irrelevant and immaterial and outside of the issues in the case. What he considered it has nothing at all to do with this case.

Q. By Mr. Abeles: Isn't it a fact that these gag men, gag writers, they all use all these old gags, don't they? A. They do.

Q. They get together sometimes and they trim them up, don't they? A. They do.

Q. Just like they do in burlesque; one trims it up to suit his purpose and another trims it up to suit his?

A. That is correct.

Q. Up to this time you have never even thought that the continuity for some of this was taken from somebody else?

Mr. Fendler: Objected to as irrelevant and immaterial and outside of the issues in this case.

A. That is right.

The Court: He has already answered. Objection overruled. [348]

Mr. Lewinson: No further questions.

The Court: That is all. Call your next witness.

Mr. Lewinson: We rest on the issue of liability, your Honor.

Mr. Knupp: We have no further evidence on that line, if the court please.

Mr. Fendler: We rest on the issue of liability, if your Honor please.

The Court: Gentlemen, it is necessary to continue this case until about the first Tuesday in December for the evidence from the experts.

Mr. Fendler: We object to the continuance, if your Honor pleases.

The Court: I don't know how you are going to get out of it. I am going away on the 23rd and will not be here for some six weeks.

Mr. Fendler: Might we have a conference in chambers, if your Honor please?

The Court: I know. But you suggested this morning that you were both at a disadvantage over this question of liability. I have asked for help from both sides. And I thought that perhaps in the meantime there might be such a thing as a stipulation as to the profits realized from the one picture.

Mr. Fendler: If your Honor please, that involves a situation upon which it would be impossible to stipulate. [349]

The Court: It will cost you \$75.00 or \$100.00 a day for transcript and special master's fees.

Mr. Fendler: Well, if your Honor please, I would very much like, and I think other counsel would like, to discuss this entire question with your Honor.

Mr. Knupp: On this question of profits, if the court please, we are perfectly willing to submit to counsel all the figures we have, so that he can make any objection he likes to that; and we will submit what our books show with respect to what the picture cost, as to distribution, and what the receipts were. So all the basic figures, at least, will be before the court, and subject to the excep-

tions or objections, and examination by him of the books or files he would like to have examined.

Mr. Abeles: If your Honor is going to take the question of damages and decide whether or not they are damaged, I think that should be isolated from the profits. If your Honor decides they have not proven damages, then I think it should be sent to a reference.

The Court: As to the accounting, if an accounting is necessary, I am going to refer it to a special master. As to the question as to actual damages, I will pass on that question myself when the evidence is all in.

Mr. Fendler: May I call one or two matters to your attention? When it comes to profits, of course, the defendant [350] Clyde Bruckman is not responsible for profits at all. He receives no profits from the picture. And as to the profits to Universal Pictures Company, it is a very complicated situation.

There are some subsidiaries. I think their assistant secretary said there were 57.

Mr. Lewinson: 57 varieties.

Mr. Fendler: Common sources of income, and with a different subsidiary, affiliate or associate in each foreign country; and it is a very complicated situation.

I would not be prepared to accept a figure as to profits. There are questions of overhead. It is a very complicated situation.

Now, so far as the damage situation is concerned, we have put on our evidence. To permit a continuance to the defendants of three months to prepare their side of the case on damages is, after the length of time it has taken to get to trial here—through no fault of your Honor, but, nevertheless, because of the time lapse—if we have a situation where the trial is continued until

December, we go into the matter of damages at that time and then a reference for an accounting, and then a period to time that elapses between the special master's report, confirmation and so on, we are going to take up a great deal of time which all counsel in the case, if your Honor please, feel might better come [351] after the Ninth Circuit Court of Appeals has passed upon this infringement. Because we are just going through a lot of waste motion, if they are correct and the plaintiff is incorrect on the matter of infringement, and all counsel agreed before your Honor this morning that the most expeditious method of handling the case from the standpoint of both parties, if your Honor would enter an interlocutory decree, to permit them to appeal from it, test the issue of infringement, test this question of the issue on damages, and then we should have a decision by December.

The Court: A decision by December?

Mr. Fendler: I believe so.

The Court: What year?

Mr. Fendler: Well, the Ninth Circuit Court of Appeals may be further behind in its schedule.

The Court: If you get a decision in a year and a half you will be lucky, and by the time you get up your records, your briefs and everything under your plan it will mean two appeals, the possibility of two appeals, and you will be the next five years getting this case to a final conclusion.

If I hear the evidence and make the findings, and if I fix damages and the basis upon which they are fixed, the profits are determined, and it goes to the Circuit Court and they determine that there is infringement, then they will either affirm my method of arriving at a judgment

or modify [352] it or send it back to the court with direction.

On the other hand, if we submit it to the Circuit Court on infringement alone, it will go up there for a year and a half, it will come back, take six months or so, assuming, for instance, that you should prevail in the Circuit Court and they find infringement, and then you would have to go back again to find out whether my method of calculation is correct.

Mr. Fendler: I think we all had in mind that the question of whether or not the evidence was properly admitted over objections or not would be determined upon this appeal.

The Court: No, it would not. That would not go before the court unless both sides are in.

As I have expressed myself before, I believe, after seeing the pictures, that there is clearly an invasion of Mr. Lloyd's picture in this script or this magician's coat sequence; and whether or not the defendants can do that with impunity, without liability, is a question the Circuit Court will have to pass upon. But I am satisfied that when the Circuit sees those pictures they will look at them the same as this court has looked at them and any other layman will look at those pictures. And I feel satisfied on that angle.

But I am at somewhat of a loss to arrive at the proper method of ascertaining and fixing the damages. I was going to suggest that, while you have placed evidence on the witness stand in that regard, I do feel that counsel have been some- [353] what misled by some of our discussions in chambers on the element of damages. And even if they had not been misled, I want everybody to feel that they have had their full day in court, whether

they agree with my decision or not. I was going to suggest that both of you, if you desire to, have not more than two experts who will testify on the re-issue value of these pictures and, in the event that they are re-vamped, whether they have any sale value now or whether they would have had any sale value before So's Your Uncle was released.

I am also interested in and I want evidence on this Columbia picture. I feel that that is an element that the court will, of necessity, have to take into consideration if the court allows any actual damages. The extent of the showing of that film, it seems to me, would have a tendency to lessen Lloyd's claim against the defendants on that issue.

Those are things that I want. I am not going to decide the case just because they hand it to me on a platter, when I feel there is evidence available that will enable me to at least satisfy myself in my own mind that I have rendered an honest and intelligent opinion.

Mr. Fendler: May an injunction issue forthwith, your Honor, against the further distribution?

The Court: I understand this film has been impounded and is not in circulation.

Mr. Abeles: After the statement in the answer on that, [354] there is no point in an injunction.

Mr. Fendler: The answer certainly did not suggest that.

The Court: You can arrive at that by making an application if there is any showing that it is being exhibited.

Mr. Fendler: They claim it has been withdrawn.

Mr. Abeles: It will be.

The Court: There is no occasion for granting an injunction which will have to be on bond to protect the plaintiff.

Mr. Fendler: Not after trial.

The Court: We have not finished the trial. We are in the course of the trial.

Mr. Knupp: We would like to present to the court, of course, before you hear the testimony of these witnesses, our memorandum on the law with respect to this question of damages, so that when the court listens to the expert testimony the court will be fully advised of the proposition.

The Court: I am going to ask that within thirty days each side submit his points and authorities on that question of what is actual damages and the elements of actual damages, and any cases that you have that will throw light as to how that is established.

Mr. Lewinson: Before your Honor's mind becomes set definitely on the matter of liability—

The Court: I have not said that there is liability. I said that I am satisfied it is an invasion, and that whether [355] there is liability or not, I am going to let the Circuit Court of Appeals pass on that question.

Mr. Lewinson: I believe that on the question of the infringement and the question of the right of the plaintiff to prosecute the action, that the court could be further enlightened by original memorandum or additional memorandum; but if your Honor feels that counsel could not be of any further help to the court, of course, we do not want to engage in that labor. But I am quite convinced that if the matter is presented to the court from the

standpoint of infringement, that the court can get further light than it has already obtained; and also from the standpoint of the right of the plaintiff to prosecute his action.

In our memorandum we have not gone into a number of questions which I think the court will have to consider; and I think it is only fair to present to this court the points that the Circuit Court of Appeals will have to consider if a judgment is adverse.

I am saying that in all candor because I think it is the duty of counsel. However, we will be governed by your Honor's wishes.

The Court: I am free to receive any memorandum that counsel wishes; and I hope that however I decide this case it is appealed so that both sides can have the opportunity to spend all the money they want to. As I have expressed myself [356] before, you have decided to wash your linen in public, and I think you should be perfectly willing to pay the bill. And so, as far as I am concerned, I will help you to make your record and I am going to take that into consideration if I grant judgment for the plaintiff in fixing attorneys' fees.

It will only take us a day, will it not, to receive that evidence?

Mr. Knupp: I think that is all, if the court please. I do not think it will take outside of two days at the outside.

The Court: Gentlemen, I can take this up on Friday, the 16th day of November.

Mr. Knupp: That will be satisfactory to us, if the court please.

Mr. Fendler: That will be satisfactory.

Mr. Lewinson: Would the court like a copy of the transcript?

The Court: I expect it.

Mr. Fendler: Pardon me, Mr. Lewinson?

Mr. Lewinson: I suppose we should share equally the expense of the court's copy of the transcript?

Mr. Fendler: Yes.

Mr. Knupp, we have these films that were supposed to be brought down here at ten o'clock in the morning. I will see that they are returned to you, if agreeable. Can it be stipulated that your picture shall be identified as plaintiff's [357] exhibit next in order and the Columbia picture, as your exhibit?

Mr. Knupp: It has already been marked as our exhibit, as I understand it. If the court please, it is perfectly all right to me what happens to these films. The plaintiff's film is returned to his custody until this case is heard on November the 16th and ours is returned to us, and Columbia's is returned to Columbia. It is perfectly all right to me.

Mr. Mendler: And each picture to be available to the other upon reasonable request?

Mr. Knupp: That is right, if we want to show them to witnesses.

Mr. Lewinson: So stipulated.

The Court: I am not going to listen to more than two experts on either side.

Mr. Fendler: We offer into evidence that continuity of Movie Crazy which has superimposed over the photograph of the credits as they appear on the picture.

Mr. Lewinson: Just a minute.

Mr. Fendler: That is the photograph at the bottom of the page.

Mr. Lewinson: I know. But I thought you had rested. Are you asking to have the case reopened?

Your Honor, I do not want to appear to be in the position of being technical, but I think it is obvious that this docu- [358] ment has been changed since yesterday and I refused to stipulate to it without foundation then unless counsel introduced it as it had been delivered to him by Paramount.

The Court: Just forget it. I don't need it, anyhow. I saw the pictures and the scripts do not mean, really, anything to me in that regard.

Mr. Fendler: We ask it be marked for identification, if your Honor please.

The Court: It may be marked for identification.

The Clerk: Plaintiff's 5, for identification.

The Court: All right, that is the order, gentlemen.

(Whereupon, an adjournment was taken until 10:00 o'clock a. m., November 16, 1945.) [359]

Los Angeles, California, Friday, November 16, 1945
9:00 a. m.

The Court: You may proceed.

The Clerk: 4361, Harold Lloyd Corporation, a California corporation, v. Universal Pictures Company, Inc., a Delaware corporation, and Clyde Bruckman, and others.

Mr. Fendler: We are ready for the plaintiff.

Mr. Knupp: We are ready.

Mr. Lewinson: The defendant Bruckman is ready.

Mr. Abeles: Now, if the court pleases, Mr. Fendler cited at the start—I would like to point out Mr. Fendler cited a case, MacKenzie against Congo Pictures Limited, which he said was tried—

The Court: Pardon me just a moment, Mr. Abeles. I understood there was a witness called for this morning.

Mr. Abeles: Do you want to put him on first?

The Court: I think we should dispose of that, then we can go into the other matters.

Mr. Abeles: Mr. Lloyd, will you please take the stand?

HAROLD LLOYD,

called as a witness by and on behalf of the defendants, having been previously duly sworn, was recalled and testified further as follows: [362]

Direct Examination

By Mr. Abeles:

Q. Mr. Lloyd, you testified that the Chaplin picture entitled *The Gold Rush* had been re-issued. Do you recall that? A. That is correct, yes.

Q. That was a silent picture, was it not?

A. Yes.

Q. Now, do you contend that your silent pictures have a re-issue value? A. Naturally.

(Testimony of Harold Lloyd)

Mr. Fendler: Just a moment. There are no silent pictures involved in this lawsuit, if your Honor please, and we object to any question of Mr. Lloyd which is predicated on something outside of this lawsuit. Movie Crazy is a talking motion picture.

The Court: Objection overruled.

Q. By Mr. Abeles: What value do you put upon the re-issue rights of the motion picture Grandma's Boy?

Mr. Fendler: Just a moment. We are going clear outside the issues in this case.

Mr. Abeles: If your Honor please—

Mr. Fendler: Universal has taken other motion pictures, one of which involves a silent motion picture, The Freshman, and we object to the attempt to try any of these other cases [363] by this line of questioning in this court where no silent picture whatever is involved.

Mr. Abeles: I am not going to bring in any case—any picture involved in any other case. I will tell you that now.

Mr. Fendler: You are bringing in Grandma's Boy.

Mr. Abeles: I have a reason for bringing in Grandma's Boy and I will tie it up and connect it up. The next question will bring it out. After I ask these questions you will find out why I am asking these questions. It is very material and our whole defense is predicated on the questions I am asking the witness.

Mr. Fendler: Then the line of questioning and the purpose should be disclosed, because as it stands it is entirely irrelevant.

The Court: Is the picture Grandma's Boy involved? Is that the name of the picture you asked the witness about?

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The Court: Is the picture Grandma's Boy involved? Is that the name of the picture you asked the witness about?

(Testimony of Harold Lloyd)

Mr. Abeles: "Grandma's Boy" is the picture I asked about. The picture here is Movie Crazy.

Mr. Fendler: And Grandma's Boy is directly involved in other litigation.

Mr. Abeles: How about Girl Shy? Is that involved, too?

Mr. Fendler: I believe all the silent pictures are involved in the other litigation which involves the silent picture The Freshman. [364]

The Court: There is only one picture involved in this case.

Mr. Abeles: But if your Honor please, I am laying a foundation for certain testimony now. I promise your Honor this is very material.

The Court: With that assurance I am going to let you proceed with the question, but it is understood this witness is your witness and you will be bound by his testimony.

Mr. Abeles: That is correct, sir.

Q. What are the re-issue rights of Girl Shy? That is, what are they worth today in your opinion?

The Court: If you know.

A. I don't think anybody—it depends on what I do with it. You are talking about the re-issue rights?

Q. By Mr. Abeles: That is right.

A. Naturally you would have to embellish it today. You would have to narrate it to a certain extent. You would have to score it. That would naturally depend upon how well you did that and who did it. I think I could do it and it would probably be very valuable.

Q. And would the same apply to the picture Safety Last?

A. I would say it would, yes.

(Testimony of Harold Lloyd)

Q. How much would you say the re-issue rights of each of those two pictures is today? [365]

Mr. Fendler: That is objected to as incompetent and outside of any issue in the case.

The Court: Counsel, you are asking this witness to give a snap opinion. I am going to advise the witness if he does not know he should say so. It is difficult for a man to fix the value of a picture that he has not studied. If he has studied it and given it consideration that is something else, but to pull something out of the blue sky and ask him what its value is is unfair.

Mr. Abeles: But he testified in this trial, Judge, what the re-issue rights of *Movie Crazy* were. I assumed he would have in mind what the value of it is.

The Court: Not necessarily. I may know the value of my automobile but would not necessarily know the value of somebody else's automobile unless I made a study of it.

Mr. Abeles: This is his own picture.

The Court: I am going to advise the witness if he doesn't know he may so state.

Q. By Mr. Abeles: You say it is very valuable. What did you mean by that? That the re-issue rights of these two pictures may be very valuable?

A. Just what I repeated before—what I stated before.

Q. If you had made them yourself, you mean?

A. I think so. [366]

Q. I mean if you re-issued these?

A. If I re-issued these myself is what I said.

Q. Suppose you sell the re-issue rights would they be valuable too?

(Testimony of Harold Lloyd)

Mr. Fendler: That is objected to.

The Witness: That is another thing.

Mr. Fendler: Upon the grounds previously stated.

The Court: Objection overruled. Let us get to the evidence.

The Witness: My pictures are not up for sale; therefore, you are asking me about something I haven't gone into.

Q. By Mr. Abeles: Have you ever—withdraw that question. Have the re-issue rights to any of your motion pictures ever been sold or licensed?

A. One, Milky Way for the re-make rights.

Q. You testified before, didn't you, that they had never been sold.

A. Milky Way doesn't belong to me but it happens to be a picture that I started.

Q. Well, outside of Milky Way, eliminate that, have the re-issue rights of any of your other pictures ever been sold, licensed or disposed of?

A. No; because I haven't had them up for sale.

Q. That is all.

Mr. Fendler: Did you have in mind the license to [367] California Picture Corporation?

Mr. Abeles: I did not. I said the re-issue rights.

Mr. Fendler: Are you through, Mr. Abeles?

Mr. Abeles: No, no.

Mr. Fendler: All right, go ahead.

Q. By Mr. Abeles: Now, Mr. Lloyd, you said that you took into consideration when you fixed the value of

(Testimony of Harold Lloyd)

the re-issue rights and the re-make rights that you were going to re-make *Movie Crazy*, is that right?

A. I don't recall whether I said that or not but it is very probable.

Mr. Fendler: That isn't the testimony.

The Court: I wish you would not interrupt the examination, counsel.

Mr. Fendler: If your Honor please, can't I make an objection?

The Court: Of course you can make an objection, Mr. Fendler. I want to get this evidence in and I do not appreciate your sitting there and making comments. If you have an objection to make get up and make it and I will rule on it. We are going to proceed in an orderly manner.

Mr. Fendler: We object to it upon the ground that was not the testimony of the witness.

The Court: Objection overruled. The record will speak for itself. [368]

Q. By Mr. Abeles: Let me ask you this: Did you have in mind when you testified to the re-issue value and re-make value—

Mr. Fendler: Just a moment.

The Court: To what he had in mind I will sustain an objection to.

Q. By Mr. Abeles: What did you base your figures of the re-issue value and the re-make rights of *Movie Crazy* on, Mr. Lloyd?

A. In the first place, re-issues and re-make rights at the present time are making tremendous amounts of money. There are many cases that will substantiate that. *Abie's Irish Rose*, for instance. The re-make rights have just been sold for over \$350,000 plus percentages.

(Testimony of Harold Lloyd)

Mr. Abeles: I move to strike that out, if your Honor please. This man did not make the contract and he knows nothing about it.

The Court: Objection overruled. You asked for it and you now have it.

Mr. Abeles: I did not ask him that.

The Court: Counsel, just a moment—

Mr. Abeles: He is not answering my questions.

The Court: You asked the question and the answer will stand.

Mr. Abeles: I asked the simple question— [369]

The Court: Proceed, I have ruled.

Q. By Mr. Abeles: Abie's Irish Rose is a very famous play, is it not? A. I would say yes.

Q. And it ran for many, many months on the stage in New York City, didn't it? A. I think it did.

Q. And played elsewhere—companies went throughout the United States, didn't they? A. I think so.

Q. And it is still a very well known title, Abie's Irish Rose, isn't it? A. I think so.

Q. And the story could be sold over and over again for motion pictures, couldn't it?

A. Well, that is a matter of opinion.

Q. But it has been, hasn't it?

A. I say that is also a matter of opinion.

Q. But I say, you know that it has been sold twice for motion pictures, don't you?

A. I think so but I am not positive.

Q. You are not positive? Didn't you just testify it was sold the second time for motion pictures?

A. This last time, yes; you said "twice".

(Testimony of Harold Lloyd)

Q. You know the picture was first made by Universal, [370] don't you?

A. I don't recall. I never saw it.

Q. You did not even know it was made by Universal?

A. I don't recall it, no.

Q. But you know it? A. Vaguely.

Mr. Fendler: Just a moment, if your Honor please. We object to that as assuming a fact not in evidence. The picture which counsel refers to was the Cohens and Kellys, which I believe was stolen by Universal from Abie's Irish Rose.

The Court: Just a moment, Mr. Fendler. You are talking too much again. Please sit down. If you have an objection to make, please make it.

Mr. Fendler: We object to it on the ground it assumes a fact not in evidence. There is nothing in evidence that Universal ever made Abie's Irish Rose.

Q. By Mr. Abeles: Do you know that Abie's Irish Rose was ever made into a motion picture?

A. Not positively.

Q. I want to read you a question and answer from your testimony in *The Freshman* action:

"Q. When you say that is its value for re-make purposes, do you mean by that that is the value which someone would pay to acquire the rights?"

You are talking about the re-make rights to *The Freshman*. [371] Your answer was:

"A. No.

"Q. Or what you figure your company could have made by re-making?

"A. By re-making it.

(Testimony of Harold Lloyd)

“Q. In other words, it is your estimate of what the profit would have been had you re-made it and distributed the picture generally.

“A. What I could probably be able to do with the picture.

“Q. The profit you would have been able to make with it yourself?

“A. That is right.”

Now, that applies to *Movie Crazy*, too.

Mr. Fendler: Just a moment now. If your Honor please, we object to the line of questioning upon the ground that counsel first interrogated the witness—

The Court: Objection is sustained.

Q. By Mr. Abeles: When you testified, Mr. Lloyd, that the re-issue rights of *Movie Crazy* were worth a certain amount of money you had in mind making it yourself, didn't you?

Q. You are talking about the re-issue or re-make?

A. Yes and no. Could be both ways. I think making it myself would be more satisfactory to me. [372]

Q. That is what you had in mind when you stated the figures that you thought the re-make rights were worth, did you not? A. Not necessarily.

Q. Why did you have that in mind in *The Freshman* action?

The Court: Just a moment. That is argumentative, counsel.

Q. By Mr. Abeles: Did you have in mind re-making *The Freshman* yourself or selling the re-make rights?

Mr. Fendler: Objected to as immaterial.

The Court: I am going to sustain the objection. We are not trying *The Freshman* case.

(Testimony of Harold Lloyd)

Mr. Abeles: Your Honor, he testified in that action—

The Court: That case was tried a long time ago, was it not?

Mr. Abeles: No. This deposition was taken the other day.

Mr. Fendler: That is the case before Judge Hollzer.

Mr. Abeles: Only taken the other day.

The Court: I am going to sustain the objection. We are trying only one lawsuit here.

Q. By Mr. Abeles: If you made it yourself, re-made it yourself, then you had in mind the profits that you would make from the picture, if you re-made it, is that correct? [373]

A. How do you mean? I had in mind I would make it. If somebody else re-made it I think they would make great profits, too. I happened to say that I personally would like to re-make it myself.

Q. But you testified to the re-make value of that picture. You said—

The Court: What picture?

Mr. Abeles: Movie Crazy, the picture involved in this action. I asked you whether or not you intended to re-make it yourself and you said that depended. Now I ask if you had in mind, if you did make it yourself, that the amount that you testified to would be the profit which you might have received from the re-make rights.

A. I don't know whether I said it that way or whether I said I could make it or somebody else could make it. I think somebody else could make equally, probably, as great money if they made it the way I think it should be made.

Q. Can't you answer the question?

(Testimony of Harold Lloyd)

The Court: I think he has answered it.

Mr. Abeles: I don't think, so, judge.

The Court: It is not within your province to pass upon that question.

Q. By Mr. Abeles: You say you had in mind two things—either you would re-make it or somebody else would re-make it, is that correct? [374]

A. Naturally.

Q. Now, if you re-made it did you have in mind that figure you testified to as being the profit that you would make from making that picture?

A. I don't recall what I said in the deposition—whether I said I would get it or somebody else would get it.

Mr. Abeles: Is that a direct answer? I asked him a straight question. I did not ask him what he testified to.

The Court: Read the question.

(Question read.)

Mr. Fendler: The witness testified in two depositions. One case is on trial here and I do not believe that counsel is putting the question in such a manner that the witness can answer it.

The Court: I think the witness can answer the question directly.

The Witness: Will you read the question again, please?

(Question read.)

The Witness: You are asking me to assume something. I think you can make a great deal of profit if I made it myself and I think someone else could make a great deal of profit if they also re-made it.

(Testimony of Harold Lloyd)

Q. By Mr. Abeles: When you gave a certain figure as the value of the re-issue rights if you made it yourself, you had in mind the profits you would make, didn't you? It [375] couldn't be anything else.

The Court: That has been asked and answered several times, counsel.

Q. By Mr. Abeles: Upon what did you base the figures that you gave?

The Court: What figure is that?

The Witness: What figure are you speaking about?

Q. By Mr. Abeles: How much did you consider the re-make rights of Movie Crazy were worth?

A. How much the re-make rights of Movie Crazy?

Q. That is right.

A. Well, they could be worth anywhere from 3 to 4 to five hundred thousand dollars. It would be according to how it is re-made and how well it is done.

Q. When you state that figure who have you got in mind would re-make it? You or somebody else?

A. Myself or somebody else. It would be according to how well done it is. That is what I tried to make plain.

Q. If you re-made it yourself the figure you have in mind would be the profits that you anticipate making from the re-making of that picture, is that right?

The Court: Just a moment, counsel. That is not a fair question. This witness testified it would depend upon whether he made it or somebody else made it and if it was well made. You turn around now and try to twist that answer. [376] You may be able to do that in New York, but you cannot do it in this court. You might as well make up your mind to that.

(Testimony of Harold Lloyd)

Mr. Abeles: Your Honor, I am not twisting his answers. I am asking the witness a straight question upon what he bases that figure if he re-made it himself.

The Court: That wasn't the question at all.

Mr. Abeles: That is the question I am asking.

The Court: He has already answered that question.

Mr. Abeles: He has never answered it. I am sorry. He has never answered it. He ducked it each time. He evaded it.

The Court: Just a moment, counsel. He has testified that large sums of money could be made out of it whether he made it or some other actor took the leading role in it, all depending upon whether it was well done. He has not confined it to his own acting.

Mr. Abeles: I asked him if he did make it himself upon what does he base that figure. Don't you think I am entitled to that answer? That is all I am asking. It is a simple question. I am stymied by him saying it is four or five hundred thousand dollars. I cannot ask him what he bases that upon.

The Court: You may ask him that.

Mr. Abeles: That is all I am asking. That is what I have been trying to get for ten minutes, but I haven't succeeded. [377]

The Court: You may ask the question, but remember you are bound by this witness' testimony.

Q. By Mr. Abeles: What do you base that figure upon if you re-made it yourself? That is a simple question. Just answer that, please, Mr. Lloyd.

A. Well, I just stated that other pictures have been made, many of them.

Q. Is that an answer?

(Testimony of Harold Lloyd)

The Court: In other words, that is your opinion from your experience in the industry?

The Witness: Other pictures have been re-made and made tremendous amounts of money. What is the reason to assume that my picture cannot be just as good as the other pictures that have been re-made?

Q. By Mr. Abeles: Well, I am asking you what do you base that figure on? Do you base it on the profits you would make from it if you re-made it yourself? That is all I am asking.

A. Your question is very vague to me. I don't know just what you are driving at.

Q. How would you make \$400,000 or \$500,000 if you made the picture yourself? Do you mean the profit you would make out of it? Is that what you have in mind?

A. Naturally that is what you would make out of it.

Q. All right. That is all I have been trying to get. [378] Now you say other pictures have been made and they made a lot of money on re-make—let me ask you this question: Do you know one single picture, just one, made by a named comedian that had a secondary story and situation comedy that has been re-made, and that means Chaplin, you, Keaton, St. John, Langdon, Laurel & Hardy—anybody. Just name one single picture of that type that has ever been re-made?

A. I am doing something right now in a picture that no other comedian has done in motion pictures; I don't think they have. I don't know whether they have or haven't.

Q. You don't know, then. That is enough.

A. I wouldn't go that far to say that. I simply say that because you are asking me the question. I would

(Testimony of Harold Lloyd)

want to look it up. I am not assuming that it has not been done.

Q. But you don't know of any one instance where it has been done, do you?

A. I know the picture that Chaplin made, *The Gold Rush*.

Q. I am not saying that; I say re-make.

A. I claim it could be done by him. Whether they have done it or haven't done it I think is beside the point.

Q. That is beside the point? Well, in all these years if one single picture has ever been re-made of that nature, that is beside the point, is that right?

Mr. Fendler: Objected to as argumentative.

The Court: Yes, it is argumentative, counsel. I am not [379] going to permit you to impeach your own witness as you go along.

Mr. Abeles: I have the answer I wanted, Judge.

The Court: All right, then you have finished?

Mr. Abeles: No, just a couple more questions.

Q. Now, the re-make rights, the re-make value of a picture depends upon the production company, the producer, the director, the nature and cost of the production, the stars, the cast, the distribution, the advertising, the publicity, the press notices, public fancy and other factors, does it not?

A. I would say no matter how good any of those things are they are not good if you haven't the vehicle to start with.

Q. But you have to have all of those factors, too?

A. Not always. It is better to have them but there have been pictures made sometimes what we call a flare.

(Testimony of Harold Lloyd)

Q. But you do know, don't you, Mr. Lloyd, that the same picture could be made by one company under one set of conditions and be a financial failure, and made by another company under other conditions and be a financial success? There is no question as to that?

A. I told you it all depends on how good a picture is made.

Q. The answer is yes? [380]

A. I said according to how well the picture is made.

Q. I want to read a statement to you from the brief, just two short statements and then I am through. It was a brief submitted in the action instituted against your company by Sadie *Whitworth*. You recall that case, don't you?

A. Very well.

Mr. Abeles: It is a statement of fact on page 5.

Mr. Fendler: Just a moment. That is a quotation from a book—

Mr. Abeles: And I am going to read just a portion of it.

Mr. Fendler: If he is going to read a portion let us have it all in.

The Court: Just a moment. I am not going to let you read it at all. That case has been tried and settled. We are not interested in that.

Mr. Abeles: This is a statement of fact where he said in that case—

The Court: I am not interested in what he said in that case. How many years ago was it tried?

Mr. Abeles: Quite a few years ago. I just say this so it will be in the record. I wanted to establish by this testimony that the witness testified in that case that in pictures of this nature, that is in his pictures, that it is

(Testimony of Harold Lloyd)

not the story that meant anything but the situation. Comedy is developed for his personality. Now, if that will be con- [381] ceded, that is all I want.

Mr. Fendler: We are not conceding anything.

The Court: I am not going to permit you to impeach your own witness.

Mr. Abeles: I respectfully submit he is not my witness.

The Court: Yes, he is. You called him as your witness. He was excused and I told you this case was continued for a specific purpose, that is, to hear two experts on each side and you issued a subpoena for this man and brought him into court. I told you in my chambers this morning I would permit you to use him only as your own witness, and when you called him you called him as your own witness.

Mr. Abeles: Judge, I am not impeaching him. When I am reading from a record as to what the witness said in that case, that the story of his pictures meant nothing, only the comedy which was created for his personality.

The Court: Counsel, I have ruled.

Mr. Abeles: That is all. Under the circumstances, I can't go any further with this witness.

The Court: I would like to ask Mr. Lloyd a few questions.

Q. What is the final disposition of a picture after it has once been exhibited?

A. Well, after a picture has been withdrawn from circulation it is generally held for a certain number of years.

The Court: Where is it held? [382]

(Testimony of Harold Lloyd)

The Witness: Well, whoever happens to own it. If the studio owns it they probably keep it in their laboratory and then after so many years if they feel there is a different audience for it then it is considered for either re-issue or re-make.

The Court: Are these pictures ever destroyed?

The Witness: I think some of them have been destroyed on account of film condition and probably maybe for space. If they are considered really very valuable pictures then they keep them.

The Court: Is there any sale value to those pictures? Is there any trading in the industry in those old pictures?

The Witness: You take an old picture like the Klansman which Griffith made many years ago—I think, as I recall—I am speaking vaguely now, but I think it was re-issued and probably made quite a bit of money, and I think DeMille's King of Kings or his Ten Commandments were re-issued at various times.

The Court: How about comedies?

The Witness: Comedies the same way.

The Court: Will you see if this is a fair statement? I have this impression either obtained from the evidence or from my general knowledge of the industry, that these pictures are retained and are considered a stock in trade of the various producing companies and that after a lapse of time they either [383] use certain incidents in those pictures or in other pictures the same as was done in this case. You first made Movie Crazy and later used from that picture certain parts for other pictures. And in addition to that other studios will buy from a studio pictures that have been produced in the past, is that correct?

(Testimony of Harold Lloyd)

The Witness: Oh, yes, they buy the story, re-make it sometimes. For instance, *Milky Way* at the present time is a picture that I starred in and had a 50 per cent interest in. That particular picture sold to Samuel Goldwyn. I think it was sold for around \$125,000.00.

Mr. Abeles: I move to strike that out. He thinks it was sold for \$125,000.00.

The Witness: I think it can be proved.

Mr. Fendler: We have the records in court, if your Honor please.

Mr. Abeles: I say now it was not sold for \$125,000.-00.

The Court: I don't care whether it was sold for 75 cents. What I am trying to find out is the practice in the industry.

Mr. Abeles: Will your Honor strike out that testimony then?

The Court: Yes.

The Witness: I am trying to explain to his Honor exactly how it is. [384]

The Court: I am trying to get some information, not knowing a great deal about the industry and how they handle such things.

The Witness: *Milky Way* is being made over at the present time with Danny Kaye in a musical and they keep our picture that I made there as a guide for them to go by and they make scenes and they say, "Go in and look at the old picture." Goldwyn has told them—Danny Kaye told me this personally. He said—

The Court: Anyway, they are using that picture?

The Witness: Yes, as a guide.

(Testimony of Harold Lloyd)

The Court: And is that more or less of a common practice in the industry?

The Witness: Well, it could be.

The Court: Well, do you know whether it is?

The Witness: I think it is to a degree.

The Court: Do you know whether or not there are people engaged in the moving picture industry as agents who try to place these old pictures or sell them to other studios?

The Witness: Yes, I think that is very true. I think, in fact, someone representing Goldwyn recently has had a lot of Goldwyn pictures for re-issue or re-make. I think my counsel has figures on that.

The Court: And do they interchange them between studios?

The Witness: I think so.

The Court: You don't know?

The Witness: I am not positive, because I have kept [385] myself more or less in the production end of the business. However, I have been injected into the distribution end of the business and all the other forms of the business in producing my own pictures, but I try to concentrate more on the production itself.

The Court: That is all.

Mr. Abeles: Just one question.

Q. You mentioned Milky Way. Now, Milky Way was not an ordinary story written for you, was it?

A. No.

Q. As a matter of fact it was a famous stage play, wasn't it? A. May I say one thing?

Q. Yes, go ahead.

A. They didn't use the stage play. When we made Milky Way we changed it from the stage play. We

(Testimony of Harold Lloyd)

changed it all around. It was entirely different for a motion picture version and when Goldwyn made it they didn't take the stage play. They used our play, the motion picture, as the guide to make their picture.

Q. What do you mean, Goldwyn made it? Goldwyn has not made it yet, has he?

A. I am afraid he has. It is called *The Kid From Brooklyn*.

Q. He has not completed it? [386]

A. If he hasn't they are on the final scenes, because, as far as I know, they shut down on it—unless they came back to put added scenes into it. I am working on the same lot.

Q. Who were the authors of that play?

A. I do not recall the authors of the stage play.

Q. Wasn't Harry Clark one of the authors?

A. I don't know who the authors of the story were.

Q. You know Harry Clark is a well known writer, don't you?

The Court: What materiality does that have?

Q. By Mr. Abeles: Do you know the play had its opening at the Kort Theatre and it had a long run in New York City?

A. I don't see what point that has to do with it.

Q. I am asking you if you recall.

The Court: I do not think the witness has a right to make objections, but I think his objection in this instance is good.

Mr. Abeles: I am trying to establish that the only one ever sold was a famous stage play and not a story written for him. The whole point in this case is that in no single instance in the history of the motion picture

(Testimony of Harold Lloyd)

business has a single individual comedy ever been sold for re-make rights—that is, for re-make rights where the story was written [387] for the comedian and situation comedy and not based on a famous stage play or novel. This is the only one that they have sold. I am trying to point out why they sold it, is because it is a famous stage play. That is what I am trying to bring out. It was published in book form many times and circulated throughout the United States in various published forms and played throughout the United States. Stock companies went out. It is still being played throughout the United States. That is what I am trying to bring out.

The Witness: As far as I recall—I didn't recall that Milky Way was such a big smash hit on Broadway.

Q. By Mr. Abeles: You didn't? I have a report here. Do you know who Liggett & Johnson are?

Mr. Fendler: Just a minute, if your Honor please. A report? That is from some third party.

The Court: Counsel, that is a collateral matter. You are arguing about something that is collateral. I was asking general questions as to the practice in the industry which will probably come out through other witnesses that have handled that end of the business and will be qualified to testify.

Q. By Mr. Abeles: You do recall it was a stage play, don't you? A. Yes, I do. [388]

Mr. Fendler: Objected to as having been previously asked and answered.

Mr. Abeles: I never got the answer.

The Court: Counsel, I have heard enough argument between counsel. Will you please proceed?

(Testimony of Harold Lloyd)

Mr. Abeles: All right, Judge. You see the reason why I want to pursue this line of questioning—

The Court: If there is any reason for it I do not know what it is.

Mr. Abeles: That is all.

Mr. Fendler: I have one or two questions, if your Honor please.

The Court: Very well.

Cross-Examination.

By Mr. Fendler:

Q. At the previous hearing, Mr. Lloyd, you testified that you did not know what theatres the Columbia short had been exhibited in nor the type of theatres it has been exhibited in or played in, but that you believed that the Columbia short might have done you a great deal of harm if it had played in all of the theatres that the Universal feature picture *So's Your Uncle* played in. Do you desire to correct that answer?

Mr. Abeles: I object to it on the ground that was not the answer—if it played in all the theatres that the [389] Universal picture played in. You read the transcript and you will see it does not say that.

Mr. Fendler: Page 127, line 1.

The Court: Counsel, and this applies to each of you. You both talk too much in the first place and in the second place you get up in an aggressive manner, which is not necessary at all. There is no jury for you to impress and it certainly does not impress me. You are both wasting your time and energy. If you will just sit down in your chairs and not jump up as though you are ready to jump into the ring all the time we will get along better.

(Testimony of Harold Lloyd)

Mr. Abeles: I thought you were supposed to stand up.

The Court: You may stand up when you want to address the court but you do not have to jump up and lean against the desk here as though you are waiting for a chance to jump into the ring when opposing counsel asks a question.

Mr. Abeles: If your Honor please, then I respectfully object on the ground that is not the testimony in the record. I ask counsel to read the testimony and then ask his question.

Mr. Fendler: Page 125. I will start at line 23 so we will get the sequence.

"The Court: What would you estimate the damage done to you by the Columbia picture?

"The Witness: I haven't gone into that, your [390] Honor. I would say it is minor compared to So's Your Uncle. I haven't gone into that.

"The Court: In other words, you do not know?

"The Witness: Not at the present time, no."

Then recross-examination by Mr. Knupp:

"Q. I think you said specifically, Mr. Lloyd, that you had no idea in how many theatres the Columbia Picture was circulated?

"A. I just heard it stated here.

"Mr. Fendler: No, no. 'Columbia,' he says.

"Mr. Knupp: The Columbia picture.

"A. No, I haven't.

"Q. And if it should develop that it was circulated in approximately the same number of theatres as the Uni-

(Testimony of Harold Lloyd)

versal pictures, would your answer that the Columbia picture had done you no harm still be the same?

"A. No, because I would say it was the type of theatre that it plays in.

"Q. If it appears that it was circulated in the same type of theatres as the Universal picture, would you still say that the Columbia picture had done you no harm?

"A. I would say it had done me a great deal of [391] harm if it had been played in all the theatres the other one played in."

Mr. Fendler: Now, the question that I asked the witness was whether he had desired to correct that answer or to enlarge on it.

Q. Do you, Mr. Lloyd?

A. May I answer that?

Q. Will you, please?

A. I have had time to think it over. My opinion is that a short does not compete with a feature picture. In the first place, a great many times shorts are purchased by the theatres but are not always shown. Many, many times—a great many times in the evening they haven't time to show them. Sometimes they are purchased and never show them. Another thing, in this particular short the comedy is done so broadly and so unbelievably bad and it is in such a hodge-podge of comedy sequence that I cannot possibly see how that could do anything but very minor damage and certainly not keep us from re-making or re-issuing a picture.

Q. In your opinion, then, the circulation of the Columbia short during the years 1942 and 1943 did not impair

(Testimony of Harold Lloyd)

the value of the re-issue rights or re-make rights of your motion picture, is that correct? A. That is correct.

Mr. Abeles: I object to that. [392]

Q. By Mr. Fendler: Now, counsel asked you one or two questions upon the question of—I will withdraw that. That is all.

Redirect Examination

By Mr. Abeles:

Q. Mr. Lloyd, you know since the last hearing the deposition of an officer of Columbia Pictures Company has been filed in this court, don't you?

A. I think vaguely I heard something about it. I don't know the details.

Q. Has that anything to do with the change in your answer from the last time?

A. No, it definitely has not.

Q. And the fact that he said it played various types of theatres throughout the United States, in more theatres than *So's Your Uncle*, that had nothing to do with changing your answer, did it?

A. There was quite a bit of discussion the other time about whether the short had previously damaged our picture and I thought I might as well make that clear because when it was asked me before I had no time to think about it but since then I have had time to think about it.

Q. But you did assume at that time that a short would not play as many theatres as the Universal picture *So's Your Uncle*? [393]

A. I stated at that time it was vague and I didn't know what the answer was.

(Testimony of Harold Lloyd)

Q. But you were surprised when you heard the short did play more theatres, more than the Universal picture?

A. I don't recall how many it played.

Q. Don't you think, sir, if anyone sees a sequence in a short it would have the same effect as if he saw it in a Grade B picture?

A. In that short, no. It was done so poorly and as I said, so unbelievably bad and in such a hodge-podge I don't think it could hurt anybody.

Q. Wouldn't it hurt you more done in that manner than in a fine manner?

A. No, because in a fine manner is what we try to do—a very believable manner. If it is done that way and made a part of the story then it hurts us tremendously.

Q. It was done substantially the same in the Columbia picture as it was in your picture, was it not?

Mr. Fendler: Objected to as argumentative.

The Court: I did not hear the question.

Q. By Mr. Abeles: It was done substantially the same in the Columbia picture as it was done in your picture?

The Court: Gentlemen, I have decided that I am going to see the picture. There is no use talking any more about that. I will see the picture myself and then will make up [394] my own mind.

Mr. Abeles: Then I won't have to talk about that. That is all right, sir.

Mr. Fendler: That is all, Mr. Lloyd.

The Court: The witness is excused.

Mr. Fendler: I hope so.

The Witness: May I thank the court for its consideration in moving up the hour of the hearing? Thank you very much.

Mr. Fendler: If your Honor please, we subpoenaed a witness, the general manager of the Samuel Goldwyn Pictures Corporation. Counsel for Universal has denied that the sale price of the re-make rights of Milky Way was \$125,000. Mr. Selvin, who represents Samuel Goldwyn, asked me whether I would be willing to have this witness disregard the subpoena if he brought the original contracts to court at which time the defendants might desire to object upon the ground that the evidence of the payment of \$125,000 for the re-make rights was immaterial and incompetent, upon which the court would rule, and if the court overruled the objection, then in such event the fact would be received in evidence just as if the witness testified to it here in person. Is that the understanding, Mr. Selvin?

Mr. Abeles: Wait a minute, Mr. Selvin.

Mr. Herman Selvin: If I may state to the court, the [395] position that I took with Mr. Fendler and with counsel for the defendants also—I am perfectly willing to produce and have the contracts in question. I do not desire that they be made public property unless they be ruled competent and relevant to the issue in this case. Whether they are or not, I don't know. I have nothing to do with that. If they are ruled to be admissible the contracts are here and I am sure that the parties could agree that they are correct copies of the contracts without the presence of Mr. Ezzell.

Mr. Fendler: That is the understanding, your Honor, so we submit it to your Honor for your ruling.

The Court: Counsel, what another picture sold for in my opinion is not admissible. It would be like saying

two buildings were sold, one for a small price and one for a high price without an appraisal. An appraisal would have to be made of those buildings to determine whether one was comparable to the other. The same is true with pictures that may have been sold. One may have been sold for a large sum of money but whether it is comparable to another picture is a different question altogether.

Mr. Fendler: May I say, if your Honor please, that the defendants have produced evidence in this case that none of the Harold Lloyd pictures have any re-issue or re-make value. Now, it appears to me—

The Court: That is all right. There is a conflict and [396] that is what the court is going to have to rule upon. Mr. Lloyd has testified that they have. I will hear the evidence and then I will make my ruling or a finding on that.

Mr. Fendler: We respectfully submit, your Honor, that the defendants have offered evidence that the Harold Lloyd picture has no re-make value and Mr. Lloyd has testified that Milky Way, which we can show never recouped its negative cost and was a picture which did not begin to be as successful as Movie Crazy, that the re-make rights sold for \$125,000. That is not only fully corroborated by Mr. Lloyd's statement, which has been denied by defendants' counsel, but it is a complete rebuttal of the defendants' expert evidence that the re-make value of the Lloyd picture—

The Court: I haven't heard the expert evidence yet.

Mr. Fendler: I am referring to Mr. Geller's testimony which was produced at the last trial in which he so testified.

The Court: Well, that is a question of fact, gentlemen, for the court to pass upon. While I have not had

an opportunity to fully explore all the briefs in this case, particularly those that were showered upon me this week, and one of which contains nearly 60 pages, covering the entire subject matter and arguing the evidence and so forth, this hearing is held for a specific purpose and that is to [397] determine whether or not Mr. Lloyd suffered any damages by reason of this Universal picture.

I have heretofore indicated my attitude and a re-reading of the testimony has convinced me that there has been a willful and deliberate infringement here. It was not an accidental occurrence. It was deliberate and willful. There has been an interference with the property rights of Mr. Lloyd. Counsel argues that such a finding is speculative. When it comes to the amount of damage that, to a certain extent, may be true. But I do not believe you can interfere with a man's property rights without some damage resulting. In my mind damage has been established. The question is how much, and that is what this hearing was called for this morning.

Counsel has spent considerable time on the question of profits and accounting. I think the Sheldon case gives us the clue for determination of damages.

In that case it fixed the apportionment, but the language used in that case wherein the committee report was quoted, indicates that this present section was modeled after Section 70 of the patent Act. While it speaks of damages and profits, nevertheless at the present time I am of the view that if the profits in the court's opinion were not sufficient to cover the damages the court can then make a finding of damages and add to those profits a sufficient [398] amount to cover the damages.

In other words, the plaintiff is not entitled to both damages and profits. He is entitled to one recovery.

I may be wrong and I will give you gentlemen an opportunity to convince me when we are through with the introduction of evidence. But I am now interested solely in the question of damages. I do not know whether counsel have been able to stipulate as to the amount of profits made on this picture.

Mr. Fendler: I think we will be able to, your Honor. Mr. Knupp and I have discussed it.

The Court: It may be when that figure is produced in the court's mind it will be sufficient, an adequate amount. On the other hand, if the court should feel it is not the court will add such an amount to it in the form of damages as it thinks proper.

As I stated before, I am not impressed with these figures that sound like the national debt that come out of Hollywood, but I am going to listen to the evidence and I suggest that counsel introduce the evidence that the court has indicated it is interested in.

Mr. Abeles: If your Honor please, on the other point Mr. Fendler raised, I never contended that you couldn't sell the re-make rights of any motion picture, comedy motion picture. In fact, I pointed out Milky Way was a very famous stage play. What I said was, you couldn't sell any other [399] type. Now, so far as the Goldwyn contract is concerned, I cannot see how another picture is any evidence of the value of this picture. Under the authorities I have got it has to be the same standard source.

The Court: That is my attitude and approach.

Mr. Fendler: Is my offer of proof denied?

The Court: Proceed with the evidence.

Mr. Fendler: Is there a ruling on my offer, if your Honor please?

The Court: I am not going to admit it.

Mr. Fendler: Then may it be so stipulated, Mr. Knupp, that the price of the re-make—

The Court: I said I was not going to admit it.

Mr. Fendler: Oh, you are not? I apologize. Do you have another witness, Mr. Abeles?

Mr. Abeles: I have some proof to put in.

The Court: Counsel, at the time of the adjournment the defense was introducing their evidence and I was not satisfied with it and I gave the defendants a continuation for an opportunity to get what I considered better evidence.

Mr. Knupp: If the court please, I thought both sides were going to have an opportunity to put in testimony with reference to damage and we thought the plaintiff would finish their case first.

The Court: They finished their case and rested. [400]

Mr. Knupp: But I understand they have additional witnesses.

The Court: I assume they can call witnesses in rebuttal. You were on your proof at the time of the adjournment. You put certain witnesses on and I thought they were not qualified to assist the court and I explained that to you and told you that in the interest of justice the court wanted to give you an opportunity to obtain better qualified witnesses so the court would have the benefit of that evidence. Now, if you do not want to put them on—

Mr. Abeles: I had the man here, Judge. I flew him from New York, but I must have misunderstood.

The Court: We will take a recess for a few minutes if the witnesses are not here.

Mr. Fendler: We have some matters we can take up.

Mr. Abeles: May I put in some formal proof? May I go ahead with that, your Honor?

The Court: Yes.

Mr. Abeles: If the court please, Mr. Fendler mentioned in his memorandum to you the case of Byron MacKenzie vs. Congo Pictures, Limited. He said in that case in the United States District Court for the Southern District of New York the court had awarded the plaintiff \$150,000 for the use of some incidental or more or less minor material. I had that case looked into and I find it was ten years ago and that in that [401] action there was no judgment awarded by a court awarding plaintiff any money at all. It was a confession of judgment for \$150,000 after an injunction was granted. And also that they had bodily taken the plaintiff's picture, which was a travelogue, and took all the scenes and put them into their picture.

I have the certified copy of the judgment showing it was never satisfied. It was a defunct corporation which permitted a judgment to be taken by confession, which was never satisfied, and I have the confession of judgment itself and the affidavit upon which it was based, and I would like to submit them.

Mr. Fendler: May I see the papers?

The Court: You may submit those when the case is submitted. They are not evidence in the case.

Mr. Abeles: Now, if the court pleases, on the profits we will stipulate that the profits on the picture So's Your Uncle were \$20,517.28. However, that may amount, I understand, to about \$22,000. There may be some returns coming in. You see they stopped the picture immediately

they received notice of Mr. Lloyd's claim, but there may be some monies coming in from various exchanges throughout the world and they seem to think it will be about \$2,000 more. However, that will only be subject to deduction. It might be subject to deduction of taxes which would not amount to much, but [402] apparently all the other deductions are here. In other words, the gross proceeds were \$208,812.92. Against that the negative cost, and when we say "negative cost" we mean all overhead going into the making of the picture. That amounted to \$104,693.00 Besides that, there is incidental expenses for printing, advertising, and so forth, so the total costs were \$133,874.50, leaving a difference of \$74,938.42, from which would come the distribution fees throughout the world, which amount to \$54,421.14, leaving \$20,570.20 which may go to about \$22,000.00.

Mr. Fendler: Well, if your Honor please, I informed Mr. Knupp I desired certain specific information which does not appear upon this sheet. This is the first moment that I have had an opportunity to inspect this sheet and I repeat that I think I will be able to agree upon a stipulation with him. I am not prepared to stipulate, however, until I get the information that I requested, so I will take the matter up with Mr. Knupp between now and two o'clock, and by two o'clock I hope to be able to enter into a stipulation on the profits.

I might say, for example, there is no indication on this sheet as to what the charge has been for overhead, if any, and—

The Court: Well, if you get into an argument over that I will give you an opportunity to go before a special master. [403] I am not going to go into that.

Mr. Fendler: I say we will be able to reach a stipulation, I think, but I feel I am entitled to certain information which Mr. Knupp has agreed to produce for me.

The Court: Is there anything else?

Mr. Abeles: Yes, your Honor. I think your Honor asked for certain data—that is, you suggested certain data should be brought into the evidence and I think this is what you had in mind. The first preview of the picture *Movie Crazy*—I mean, I am sorry, *So's Your Uncle*, was July 20, 1943, at the Alexander Theatre in Glendale, California. The first exhibition of that picture in Los Angeles was on January 5, 1944. The picture was generally released—that means throughout the United States, on December 3, 1943—

The running time of the picture *Movie Crazy*, and these figures will be subject to check by Mr. Fendler, of course, at any time he so desires—

The Court: Why don't you submit the figures and see if you cannot agree upon them?

Mr. Abeles: You agree to those facts, don't you?

Mr. Fendler: So far there is no reason why I should not stipulate as to what Mr. Abeles read, and I do stipulate so far as his facts show those are the facts.

Mr. Abeles: Now, they have used a stop watch over there at Universal and I have the man who can testify to it. He [404] says that the running time of *Movie Crazy* by stop watch was 65 minutes, 40 seconds. He says the running time of the magician's coat sequence, and he starts from when the magician starts checking up his props and the magician taking the coat from the bus boy and threatening to hit him, and the time of that is 11 minutes, 14 seconds. Is that so stipulated?

Mr. Fendler: Pardon me.

Mr. Abeles: From the time he starts checking—

Mr. Fendler: I will stipulate to it although I do not remember any bus boy in the Lloyd picture.

Mr. Abeles: Well, he took the coat away from someone in a threatening manner.

The Court: Who did?

Mr. Abeles: The magician.

Mr. Fendler: That is correct, that is correct. That is 11 minutes. So stipulated.

Mr. Abeles: The running time of the picture *So's Your Uncle* is 63 minutes and 21 seconds and the running time of the magician's coat sequence, and he says this is likewise from the time the magician started checking up on his props and until the time he takes the coat away from the bus boy, that is 6 minutes, 1 second.

The running time of the Columbia picture *Loco Boy Makes Good* was exactly 18 minutes and the running time of the magician coat sequence in that picture he says is six minutes, [405] 15 seconds.

Mr. Fendler: I will so stipulate.

Mr. Abeles: Now, I offer in evidence a communication from Mr. Fendler dated March 20, 1945, to Mr. Nathan J. Blumberg, president of Universal Pictures Company, Inc., which I understand was the first notice of any claim as to this picture *Movie Crazy*—*So's Your Uncle*.

Mr. Fendler: You mean the first written communication from the plaintiff's attorney?

Mr. Abeles: That is correct.

Mr. Fendler: So stipulated, and it may be received in evidence.

The Clerk: Defendants' Exhibit G.

(The document referred to was marked as Defendants' Exhibit G, and was received in evidence.)

[DEFENDANTS' EXHIBIT G]

Law Offices
HAROLD A. FENDLER
Suite 1111 Pershing-Square Building
Los Angeles 13, California
Telephone MIchigan 3293

March 20, 1945.

Mr. Nate J. Blumberg, President,
Universal Pictures Co., Inc.,
Universal City, California

Dear Sir:

At Mr. Harold Lloyd's personal request, I am writing to advise you concerning a series of copyright infringements which may not have been heretofore brought to your personal attention:

Ten days ago Universal Pictures Co. Inc. released a motion picture starring the Andrews Sisters, entitled "HER LUCKY NIGHT" which is a flagrant infringement upon the copyrighted motion picture photoplay entitled "THE FRESHMAN" starring Harold Lloyd and copyrighted by the Harold Lloyd Corporation.

Within the last thirty days Universal released a motion picture starring Joan Davis entitled "SHE GETS HER MAN" which is a flagrant infringement upon two copyrighted motion picture photoplays starring Harold Lloyd respectively entitled "WELCOME DANGER" and "PROFESSOR BEWARE".

Several months ago Universal released a motion picture photoplay entitled "SO'S YOUR UNCLE" which is a flagrant infringement upon the copyright of the Harold Lloyd motion picture entitled "MOVIE CRAZY".

(Defendants' Exhibit G)

In each instance former employees of the Harold Lloyd Corporation, particularly Clyde Bruckman and Warren Wilson, now working for Universal Pictures Co., have been given screen credit as writers and/or producers of the infringing motion pictures.

The Harold Lloyd Corporation has repeatedly requested Universal in writing to withdraw "SHE GETS HER MAN" and "HER LUCKY NIGHT" from public distribution in order to mitigate the damages which have been sustained. To date these requests have gone unheeded and Mr. Lloyd has personally asked me to direct this last appeal to the individual executive officers of Universal in the sincere hope that your corporation would not persist in continuing infringements which are destroying the most valuable assets owned by my client.

A copy of this letter is being sent to the other executive officers of Universal Pictures Co., and my client would appreciate an immediate expression of your intentions in this matter.

Very truly yours,

Harold A. Fendler

HAROLD A. FENDLER

Attorney for Harold Lloyd Corporation

HAF:AD

Copies to:

Mr. Samuel Machinovitz, Treasurer,

Mr. Edward Muhl, Assistant Secretary,

Mr. Cliff Work, Vice President and General Manager.

No. 4361-BH-Civ. Harold Lloyd Corp. vs. Universal, et al. Defts. Exhibit G. Filed Nov. 16, 1945. Edmund L. Smith, Clerk, by MEW, Deputy Clerk.

Mr. Abeles: Is Mr. Ward in court?

The Court: We will take a few minutes' recess at this time.

Mr. Abeles: I just wanted to ask him one thing. Your Honor, at this time I would like to offer in evidence, and I understand it is on file, isn't it? The deposition of the Columbia Pictures Corporation. I have a copy here. It is the deposition of George Josephs of Columbia Pictures Company, taken on October 31, 1945, at 2:00 p. m., before Shirley Wiley, Notary Public in New York City. [406]

The Court: Are you going to introduce the deposition in evidence?

Mr. Abeles: I offer it in evidence with the direct and cross interrogatories.

Mr. Fendler: That is satisfactory. We will stipulate it may be deemed to have been received.

The Court: And the court will do its own reading.

Mr. Abeles: It is stipulated it will be deemed to have been received in evidence.

The Clerk: Defendants' Exhibit H.

(The deposition referred to was marked as Defendants' Exhibit H, and was received in evidence.)

[DEFENDANTS' EXHIBIT H]

United States District Court
Southern District of California
Central Division

Harold Lloyd Corporation, a California Corporation, Plaintiff, vs. Universal Pictures Company, Inc., a Delaware Corporation, Clyde Bruckman, John Doe, John Doe Corporation, Defendants. Civ. 4361-BH.

Deposition of GEORGE JOSEPHS, taken on behalf of defendant, Universal Pictures Company, Inc., at 729 Seventh Avenue, New York City, New York, at 2:00 p. m., October 31, 1945, before Shirley Wiley, a Notary Public within and for the County of New York and State of New York, pursuant to the annexed Notice.

GEORGE JOSEPHS,

having been first duly sworn to testify the truth, the whole truth, and nothing but the truth, deposed and testified as follows:

Answers to Direct Interrogatories

To the first interrogatory he says:

George Josephs. I reside at 401 Marlborough Road, Cedarhurst, Long Island.

To the second interrogatory he says:

Yes.

To the third interrogatory he says:

Columbia is engaged in the production of motion pictures and the distribution of motion pictures in the United States and throughout the world and has been so engaged since in or about 1928.

(Defendants' Exhibit H)

To the fourth interrogatory he says:

I was first employed by Columbia in 1928. My present capacity is that of assistant to the general sales manager and for eight years prior to the assumption of my present position I was the manager of the Sales Accounting and Statistical Department.

To the fifth interrogatory he says:

Yes.

To the sixth interrogatory he says:

Yes.

To the seventh interrogatory he says:

Two reel comedy.

To the eighth interrogatory he says:

To the extent of the number of theatres in the United States where said motion picture has been exhibited. Records as to the particular places and the dates of exhibition on short subjects are not maintained in the Home Office and it would be impracticable for me to obtain such information.

To the ninth interrogatory he says:

I cannot state and our Home Office records do not disclose in what city and state and in what theatre in the United States said motion picture was first exhibited.

To the tenth interrogatory he says:

Our records do disclose that the said motion picture was generally released in the United States on or about January 8, 1942.

To the eleventh interrogatory he says:

We do have one record known as our branch shipping sheets which does disclose that the motion picture was

(Defendants' Exhibit H)

last exhibited in the United States in the Huggin Circuit theatre in Smithville, Arkansas.

To the twelfth interrogatory he says:

Our records indicate that said picture was exhibited in all states in the United States.

To the thirteenth interrogatory he says:

I cannot state how many cities the picture was exhibited in, but our records indicate that said picture was exhibited in all types of cities, both large and small, throughout the United States.

To the fourteenth interrogatory he says:

According to our records the picture was exhibited in 7,065 theatres in the United States and that the type of theatres in which these exhibitions took place varied from large to small.

To the fifteenth interrogatory he says:

I cannot, without a detailed examination of many thousands of individual shipping sheets which cover shipments of films made by our 31 branch offices in the United States over a period of several years, determine the dates of exhibition and name of each theatre in which same was exhibited in Los Angeles.

To the sixteenth interrogatory he says:

Our records indicate that said picture has been exhibited in all types, kinds and characters of motion picture theatres in the United States, varying from large to small theatres in metropolitan areas as well as theatres in large and small towns.

(Defendants' Exhibit H)

To the seventeenth interrogatory he says:

I cannot answer your interrogatory 17 without a detailed examination of the records of our 31 branch offices relating to a period of several years and such examination would ordinarily consume a period of many months and at considerable expense.

To the eighteenth interrogatory he says:

Our records do not disclose nor do I have any personal knowledge of the nature and type of any motion pictures or of any specific motion picture with which said short subject was exhibited.

To the nineteenth interrogatory he says:

He makes no answer.

To the twentieth interrogatory he says:

Our records do not disclose and I cannot from my experience give any approximation of the number of times said picture was actually exhibited in the United States. Our records disclose, however, that the picture was licensed for exhibition to 7,065 theatres in the United States.

To the twenty-first interrogatory he says:

He makes no answer.

Answers to Cross-Interrogatories

To the first cross-interrogatory he says:

No.

To the second cross-interrogatory he says:

I am employed by Columbia Pictures Corporation in the capacity of assistant to the general sales manager and specifically my duties are to assist him in the carrying

(Defendants' Exhibit H)

out of his functions as general sales manager and the gathering and furnishing to him of statistical and other information concerning the distribution of Columbia's motion pictures throughout the United States.

To the third cross-interrogatory he says:

Yes.

To the fourth cross-interrogatory he says:

We are in possession of records which reflect that said motion picture has been exhibited in 7,065 theatres in the United States, the amount of film rental received from such licensed exhibitions and other detailed branch records which indicate the theatres and towns in which such exhibitions took place; said branch records being shipping sheets which list all shipments of Columbia Pictures product. These shipping sheets are the original source of the tabulated Home Office record showing the total number of engagements licensed and total income received, and such records relate to *Loco Boy Makes Good*.

To the fifth cross-interrogatory he says:

The shipping sheets to which I have referred.

To the sixth cross-interrogatory he says:

The shipping sheets that I have referred to contain information regarded in the industry as confidential and relate to all of the motion pictures distributed by Columbia throughout the United States during a period of four years and the detail of the income received by it from each such picture. Therefore, we cannot attach copies

(Defendants' Exhibit H)

thereof. In addition, to attach copies or to try to summarize same would be extremely expensive and burdensome as it would involve the examination of many thousands of shipping sheets. Individual records as to the exhibition of this motion picture in individual theatres are maintained only in our branch offices.

To the seventh cross-interrogatory he says:

There is attached and initialed by me a true copy of the tabulations from our records of the information furnished weekly in the shipping sheets and relating to said picture from the date of its release to the present date, indicating the number of theatres in which said picture has been exhibited in the United States as 7,065.

To the eighth cross-interrogatory he says:

Yes.

To the ninth cross-interrogatory he says:

The aggregate cost of Loco Boy Makes Good was \$19,578.00.

To the tenth cross-interrogatory he says:

I have indicated in my answers to earlier inquiries the reasons why we cannot attach copies of all of the books and records to which I have referred and which would indicate the name of each theatre in the United States wherein the picture has been exhibited and the dates of exhibition thereof.

George Josephs
(Signature of Witness)

(Defendants' Exhibit H)

State of New York, County of New York—ss.

I, Shirley Wiley, a Notary Public within and for the County of New York and State of New York, do hereby certify:

That prior to the propounding of the annexed direct and cross-interrogatories to the witness whose signature is affixed to the foregoing deposition, to-wit, George Josephs, he was by me duly sworn to testify the truth, the whole truth, and nothing but the truth;

That the said testimony of the witness was taken down by me in shorthand at the time and place set forth in the said deposition, and was reduced to typewriting by me;

That the foregoing deposition is, to the best of my knowledge and belief, a full, true and correct transcript of the answers of the said witness in response to the said direct and cross-interrogatories propounded to him by me;

That when the said deposition was reduced to typewriting it was read by the said witness, who was duly informed by me of his right to make such corrections therein as might be necessary to render the same true and correct, and was thereupon signed by the said witness in my presence.

I further certify that I am not interested in the event of the action.

Witness my hand and seal this 5th day of November, 1945.

(Seal)

Shirley Wiley

Notary Public in and for the County of New York,
State of New York.

(Defendants' Exhibit H)

Shirley Wiley, Notary Public, New York County.
 New York Co. Clerk's No. 322, Register's No.
 500-W-6. Certificates filed in Bronx Co. Clerk's
 No. 47, Register's No. 30-16. Kings Co. Clerk's
 No. 203, Register's No. 526-W-6. Commission
 Expires March 30, 1946.

UNITS BILLED WEEKLY "LOCO BOY MAKES GOOD"

Release Date Jan. 8, 1942

1/29/42

<u>Week</u>		<u>Week</u>		<u>Week</u>		<u>Week</u>	
3rd	196	47th	69	91st	8	135th	2
4th	84	48th	63	92nd	9	136th	2
5th	91	49th	64	93rd	12	137th	6
6th	95	50th	103	94th	13	138th	1
7th	134	51st	89	95th	15	139th	1
8th	98	52nd	49	96th	15	140th	5
9th	99	53rd	37	97th	11	141st	2
10th	116	54th	21	98th	13	142nd	2
11th	148	55th	81	99th	6	143rd	0
12th	118	56th	42	100th	12	144th	2
13th	120	57th	46	101th	11	145th	3
14th	108	58th	40	102nd	20	146th	2
15th	171	59th	61	103rd	16	147th	1
16th	124	60th	30	104th	9	148th	3
17th	112	61st	31	105th	4	149th	2
18th	116	62nd	36	106th	4	150th	2
19th	129	63rd	39	107th	25	151st	5
20th	182	64th	32	108th	6	152nd	3
21st	122	65th	24	109th	7	153rd	1

(Defendants' Exhibit H)

Week		Week		Week		Week	
22nd	135	66th	27	110th	10	154th	3
23rd	115	67th	32	111th	20	155th	0
24th	170	68th	23	112th	7	156th	1
25th	102	69th	27	113th	1	157th	1
26th	124	70th	23	114th	10	158th	1
27th	117	71st	26	115th	8	159th	3
28th	145	72nd	42	116th	1	160th	0
29th	121	73rd	23	117th	9	161st	2
30th	104	74th	20	118th	8	162nd	3
31st	103	75th	24	119th	4	by month	10
32nd	108	76th	27	120th	11		2
33rd	153	77th	22	121st	7		2
34th	109	78th	13	122nd	29		6
35th	105	79th	10	123rd	0		6
36th	80	80th	16	124th	8		5
37th	134	81st	19	125th	4		3
38th	81	82nd	12	126th	4		—
39th	90	83rd	21	127th	2		7065
40th	86	84th	13	128th	5		
41st	91	85th	16	129th	6		
42nd	135	86th	9	130th	2		
43rd	72	87st	33	131st	4		
44th	85	88th	12	132nd	6		
45th	71	89th	13	133rd	1		
46th	109	90th	16	134th	5		

GJ

[Endorsed]: Filed Nov. 8, 1945. Edmund L. Smith, Clerk, by E. M. Engstrom, Jr., Deputy Clerk.

No. 4361-BH. Harold Lloyd Corp. vs. Universal, et al. Defts. Exhibit H. Filed Nov. 16, 1945. Edmund L. Smith, Clerk, by MEW, Deputy Clerk.

Mr. Fendler: If your Honor please, there were certain answers to interrogatories from Universal which were ordered made on or before November 12th, and which were supposed to have been here the first part of the week. I would like to inquire whether or not the answers are in court or will be shortly made available because we desire to offer that in evidence.

Mr. Abeles: May I respectfully state the situation is this: When I received notice from Mr. Knupp that we had to answer these interrogatories I directed the New York office of the Universal Pictures Company to use every effort to get that as soon as possible.

The Court: I have read your affidavit. [407]

Mr. Abeles: And they said it would take three months. I told them they had to do it within a week. Now, the last word I had was that it was supposed to be sent here airmail, but the planes were grounded four days in New York and they told me it would be in pencil form only and it would be pretty bulky, but I have not gotten it yet. The only thing I can do is telegraph New York today and find out when it was sent and we can stipulate it will go in evidence when it is received.

Mr. Fendler: That is satisfactory except I wanted to use it for the purpose of cross examining the experts you were introducing today.

Mr. Abeles: They are not going to testify to that. What can I do. I can't do the impossible.

The Court: I appreciate that. We will take a five-minute recess at this time.

Mr. Knupp: Before your Honor adjourns there is one matter in connection with the transcript, a correction that requires being made. It is in connection with when these films were introduced in evidence. I refer to page 281 of the transcript. It appears from the record that the film So's Your Uncle is marked as defendant's Exhibit D. I understood that to be the plaintiff's exhibit and I think it should bear a plaintiff's exhibit number.

Mr. Fendler: There are some other corrections in the [408] transcript and I will get together with Mr. Knupp on the list and we will stipulate to them.

Mr. Knupp: That is satisfactory as long as the transcript is corrected before we adjourn.

The Court: We will take a five-minute recess at this time.

(Short recess.)

The Court: You may proceed.

Mr. Fendler: May it please your Honor, I am going to fill in some of the time until my 11 o'clock witnesses are here by recalling Mr. Landau, who had not seen the Columbia short when he last testified. We reserved the right to have him see the short and then testify. That reservation was made at the time, so with your Honor's permission, I will call Mr. Landau.

The Court: Are you gentlemen willing the witnesses come on indiscriminately?

Mr. Fendler: Yes.

Mr. Abeles: Yes, Judge.

ARTHUR M. LANDAU,

called as a witness by and on behalf of the plaintiff, having been previously duly sworn, was recalled and testified further as follows: [409]

Direct Examination.

By Mr. Fendler:

Q. Your name is Arthur M. Landau? A. Yes.

Mr. Fendler: This is simply recalling the witness for clarification, your Honor.

Q. At the last hearing, Mr. Landau, you were asked whether or not you had seen the Columbia short. You testified you had seen Movie Crazy and So's Your Uncle, but you had not seen the Columbia short entitled Local Boy Makes Good. Have you witnessed a showing of that short since the last trial? A. I have.

Q. Now, did your inspection of that short alter your opinion as to the testimony you have previously given with respect to the impairment or destruction of the value of the re-issue and re-make rights of the Harold Lloyd motion picture Movie Crazy?

A. No, it does not.

Mr. Lewinson: I think the question is unintelligible. May I have it read?

(Question read.)

Mr. Lewinson: By what?

Mr. Fendler: The Columbia short.

Mr. Lewinson: If that is the question I have no [410] objection.

The Court: You can cross examine him on that if you care to.

Mr. Lewinson: I did not understand it from the form of the question.

(Testimony of Arthur M. Landau)

The Court: I want to say, frankly, gentlemen, while I have not seen the Columbia short and, as I stated before, I expect to see it before the case is finally submitted, that I am interested in that picture and I feel that the court is of necessity going to have to take that into consideration in fixing and damages. I want as much light on that subject as I can get and I would appreciate your directing this witness' testimony along those lines.

Mr. Lewinson: I did not understand the question. It seemed to me to be incomplete. That was the only reason I interrupted. Excuse me for the interruption.

Q. By Mr. Fendler: Now having observed that Columbia short, does it alter your opinion and testimony previously given? A. No, it does not.

Q. Will you explain to the court why not?

A. Well, when I looked at that short, and this is only my personal opinion, I could not conceive how anything could be made as badly as that. It is really the lowest—

The Court: It uses the same sequence, does it not? [411]

The Witness: Yes, it uses it but it does not use the same fine comedy values that showed up in *Movie Crazy* and which were later on used in the Universal picture. In addition thereto, the same writers were on it, the identical writers, as I recollect.

Q. By Mr. Fendler: Mr. Landau, will you state why in your opinion—

Mr. Lewinson: Let the witness complete his answer. He is in the middle of an answer.

Mr. Fendler: He is going beyond the question.

The Court: I am perfectly willing that you permit him to talk.

(Testimony of Arthur M. Landau)

Mr. Lewinson: That is what I thought.

The Court: He asked you to explain why you do not consider that as injuring the value of the picture *Movie Crazy*. [412]

The Witness: Frankly, I think any intelligent exhibitor who bought that picture or who sees it wouldn't want to show it.

Q. By Mr. Fendler: Is there any practice or custom—

Mr. Abeles: I move to strike that out, if the court please.

Mr. Fendler: The next question will take care of that.

Q. Is there any custom or practice in the moving picture industry—

The Court: Just a moment. There is a motion to strike that I have to rule on.

Mr. Abeles: Withdrawn, if your Honor please.

Q. By Mr. Fendler: Is there any custom or practice in the moving picture industry by which exhibitors book shorts but do not exhibit them?

Mr. Abeles: If your Honor please, I object to that. It is a question of how many times a picture was exhibited. We have a deposition in evidence showing it was exhibited over 7,000 times. Now, what does that have to do with it?

Mr. Fendler: There is no evidence as to whether this picture was exhibited any time. The only evidence is as to its being booked in 7,000 theatres and we desire to show it is the custom and practice of exhibitors in the picture business, who are compelled to buy these shorts in order to get the feature pictures produced by the com-

(Testimony of Arthur M. Landau)

panies, to book them [413] and that it is the custom and practice for them to use them as fillers, but that normally for the evening entertainment when they have a double feature bill that they run the double features and they run the newsreel and the trailers and they do not show the comedy shorts.

The Court: That might be true also with the exhibition of So's Your Uncle.

Mr. Fendler: Not with the double feature. The exhibitor must, and we will show that is the custom and practice, that the exhibitor must show the two features which he has advertised and which are exhibited upon the marque, but that the practice on a double feature house is to omit the comedy short in the evening performances and, of course, many theatres only have evening performances.

Mr. Abeles: He says they have got to show the two features. Of course they do, but they can show a feature with a short or with a B picture too every day in the week. I would like to point out counsel said the deposition of Mr. Joseph did not show the number of theatres in which it was exhibited.

Mr. Fendler: I said the names of the theatres.

Mr. Abeles: No, you didn't. You said the numbers. You said the numbers did not show they were exhibited in. He said, Judge, if you might recall, he said it showed the numbers of theatres booked and the number not exhibited in. [414]

Now, in answer to an interrogatory he said there was a tabulation from our records of the information furnished weekly and the shipping sheets relating to said picture from the date of its release to the present date,

(Testimony of Arthur M. Landau)

including the number of theatres in which said picture has been exhibited in the United States as 7,065.

The Court: Proceed.

Q. By Mr. Fendler: All right. Mr. Landau, will you state whether there is such a custom or practice?

A. May I pick up that thread. It just so happens that my father was one of the oldest exhibitors in the city of New York. We opened a string of theatres in Washington Heights, most of which have been sold but some are still operating. My brother runs them now. I know many times we buy comedies that come along with the features and we don't show them. Sometimes it is because they are not good and sometimes if we have a lot of people that we want to get in and out of the houses to make two complete shows, in order to shorten the time of exhibition we eliminate the comedies. We do that particularly if it is a two-reeler. We usually use a newsreel or a cartoon comedy or something like that to shorten a two-reel comedy so that they can get the full show of the two features in.

Mr. Abeles: I move to strike out all of the testimony on the ground that the deposition of Mr. Joseph shows that [415] these pictures were actually exhibited in 7,000 theatres, so whether he and his brother or his father at times did not exhibit certain shorts is wholly immaterial.

Mr. Fendler: If the court please, they have their evidence and we have ours. Mr. Josephs is an official of Columbia Company and could have no personal knowledge as to whether the pictures that were booked in these theatres were actually exhibited and his testimony cannot raise higher than the information which he has

(Testimony of Arthur M. Landau)

available. He states that his testimony is based upon their bookings.

The Court: Counsel, on the other hand there isn't anybody who can testify those pictures were actually exhibited because they would not have such personal knowledge. Why not let me have the evidence that each of you have in regard to that and let me take it for what it is worth.

Mr. Abeles: Just one point. You said he wouldn't have the knowledge. I understand they do have the knowledge. They have an actual check when it is exhibited. They must know when the picture is exhibited.

The Court: But wouldn't that be heresy?

Mr. Abeles: It would come from the records, Judge. He couldn't go to every theatre in the country, but the exchange sends him the facts and that information shows the picture has been exhibited. As a matter of fact, the price depends on that many times. [416]

The Court: Counsel, I think you would make a fine witness in this case if you were called to the witness stand.

Q. By Mr. Fendler: Mr. Landau, is what you have described a custom and practice which to your own knowledge is followed in various parts of the country?

A. Yes, sir.

Mr. Abeles: I object to that on the ground the witness could not possibly have any knowledge of the fact, whether the various theatres throughout the United States sometimes don't like a short and don't show it. How can he tell which shorts they don't show and don't like or do show and do like?

(Testimony of Arthur M. Landau)

Mr. Fendler: I have laid the foundation. This man was in distribution for years, but I will lay it again if your Honor feels it is necessary.

The Court: I am going to restrict the answer to what he has already testified. He states after seeing the picture that it has not changed his views nor his former testimony. I am going to limit his testimony to that point and then when they cross examine him I am going to restrict his cross examination because you are going beyond the limits.

Mr. Fendler: We will stop right now then.

Mr. Abeles: You won't have to, Judge, because I am not going to cross examine him. I don't think he testified to anything that is material.

Mr. Lewinson: No questions. [417]

Mr. Fendler: I will recall Mr. Bentel.

GEORGE R. BENTEL,

heretofore sworn on behalf of the plaintiff, was recalled and testified further as follows:

Mr. Fendler: These are not the two experts. I understand I am privileged to call these witnesses in rebuttal. I am trying to get this record clear because they had not seen the Columbia short before.

Direct Examination.

By Mr. Fendler:

Q. You have been sworn, Mr. Bentel?

A. Yes, sir.

Q. Now, Mr. Bentel, before when you testified previously, you testified, I believe, that you had seen the pic-

(Testimony of George R. Bentel)

ture Movie Crazy but had not seen the Universal picture So's Your Uncle. Upon what did you base your testimony at that time?

A. Well, I had read the script but I had not seen the Universal picture.

Q. You had read the script of So's Your Uncle?

A. That is right.

Q. Have you since the trial both witnessed a showing of the picture and also a showing of the picture Local Boy Makes Good, the Columbia short? A. Yes.

[418]

Q. Does your inspection of the Universal picture, So's Your Uncle, change your mind from the testimony which you gave from having read the script of So's Your Uncle? A. No, it doesn't.

Mr. Lewinson: Just a moment, your Honor. The witness' testimony was stricken out.

Mr. Fendler: No, it wasn't.

Mr. Lewinson: Just a moment. The witness' testimony in which he gave an opinion as to damages was stricken out on the ground that no proper foundation had been laid, because it appeared on cross examination that he had not seen the picture and he hasn't given any testimony that is in the record, and I think the matter ought to be approached in a different manner.

Mr. Fendler: If your Honor please, what occurred was at the time—

The Court: What page are you referring to?

Mr. Lewinson: Page 189, line 9.

“The Court: I am rather inclined to think, Mr. Fendler, that this witness' testimony should be stricken. He has not seen this other picture and I do not see how

(Testimony of George R. Bentel)

he can, as an expert, qualify when he has not seen the picture."

Mr. Fendler: Then on the next page the court said:

"The Court: I am going to strike his evidence as to the elements of amounts of damages. His experience, etc., will [419] not be stricken, but his testimony as to the elements of damages, that is, the amounts that he has testified to here, will be stricken. Does that make the record clear?"

Now in that connection in view of the fact that we have the witness here and that he has now seen the picture, and having previously read the script and having seen the other picture, I am going to ask your Honor whether you will reinstate the evidence now that we have connected it up.

The Court: I think that is proper.

Mr. Lewinson: I think he ought to give evidence now. He has laid the foundation now. Let him give his evidence now.

Mr. Fendler: It is already in the record and I wanted to connect up the fact that he had seen the picture.

The Court: Gentlemen, I think it could be covered more quickly by asking the questions rather than arguing about it.

Mr. Fendler: Well, I just wanted to ask the two questions and then they can cross examine him.

Q. Mr. Bentel, you have seen the Universal picture So's Your Uncle, is that correct? A. I have.

Q. Has that changed the opinion which you formed after reading the script and to which you previously testified here? A. No. [420]

(Testimony of George R. Bentel)

Q. Have you seen the short, the Columbia short, Local Boy Makes Good? A. I have.

Q. Now, I think that you previously testified that that might have impaired the remake or re-issue value of—

Question withdrawn.

Having seen the Columbia short, is it your opinion that the Columbia short damaged or impaired the value of the reissue or remake rights of *Movie Crazy*?

A. Definitely not.

Mr. Abeles: I object on the ground the witness is not qualified to answer the question. He is not qualified to answer the question. There is no foundation shown. He is not in the picture business. He is merely an agent. I do not see how he could possibly answer the question.

Mr. Fendler: He has been in the theatrical and moving picture business and agency business for about 30 years so if he is not qualified—

The Court: I think that goes to the weight of it, counsel. He has testified as to his qualifications.

Mr. Abeles: I will withdraw it for the moment until I can ask him some questions.

Q. By Mr. Fendler: Your answer was "definitely not," is that correct? A. Yes. [421]

Q. Will you explain your reasons for that testimony?

A. Well, particularly the Columbia short was probably one of the worst pictures I have ever seen. I would not understand why any exhibitor would want to show it. He might be obliged to buy it to get a feature from the same releasing organization but I couldn't understand why he would want to exhibit the picture.

(Testimony of George R. Bentel)

The Court: Let me ask a question. Assuming that the patrons of motion pictures had seen that short do you feel that that fact would change your view?

The Witness: No.

Q. By Mr. Fendler: Will you explain—

The Court: In other words, you feel that this sequence, even if used in a poor picture, would have no effect upon the re-issue or remake rights?

The Witness: It was so badly done, that picture sequence, and the particular picture itself, that I believe the short was forced on exhibitors to get other pictures.

The Court: I know what you believe, but just assume for instance, and the court is going to have to make this assumption, that when the figures are given here as to the type of theatres they were displayed in, the court is going to have to assume that the theatre-going public saw that picture.

Now, it is your assumption that the exhibitors did not [422] show the picture because they thought it was a poor picture or because they wanted to save time. Assuming for instance that the theatre-going public saw that sequence in the Columbia short, would that fact in itself in your opinion have any detrimental effect upon the value of *Movie Crazy*?

The Witness: No.

Q. By Mr. Fendler: Now, why do you say that?

A. Because the Lloyd picture was so superior and that particular situation was handled so much better in the Lloyd picture that you got an entirely different impression.

Q. Well, in your opinion wouldn't there be any difficulty or impairment in the re-issue of the Lloyd picture

(Testimony of George R. Bentel)

Movie Crazy or the remake of the Lloyd picture Movie Crazy by reason of the fact that this short had been witnessed by a large number of theatre goers?

A. I don't believe so.

Mr. Fendler: That is all.

Cross-Examination.

By Mr. Abeles:

Q. Were you in the court room, sir, when Mr. Lloyd testified that the reason the use of the sequence in the defendants' picture injured him was because people would think he was a copyist? Do you recall that?

A. No, I don't.

Q. You were sitting here at the time, weren't you? [423]

Mr. Fendler: That is argumentative and immaterial. The record will speak for itself.

The Court: I think the question is proper. The objection is overruled.

The Witness: No, I don't recall it.

Q. By Mr. Abeles: Assuming that Mr. Lloyd so testified, he would still be a copyist, wouldn't he, if the public saw it in the short or saw it in the defendant's picture?

A. You mean a copyist if it was remade?

Q. Copyist. In other words, the public would still think he was a copyist if they are going to think of it at all?

Mr. Fendler: Objected to as argumentative. He is arguing on the basis of what some other witness testified to.

The Court: Counsel, it may help to clear the atmosphere if I state that I cannot help but feel that any pre-

(Testimony of George R. Bentel)

vious use of this sequence would have some detrimental effect. It will be hard to convince me that it did not have any effect. I say that notwithstanding your experts. I am going to have to determine that for myself after I have seen the short. Expert testimony as to whether it had any effect upon its value will have, as I stated before, very little weight with me because I cannot help but feel every time a sequence is used it simply increases the damage to the Lloyd picture. To argue to me to the contrary is just wasting your [424] time.

Now, the amount of damage to be awarded is a question for the court to determine under all of the circumstances in the case.

I do not need expert testimony on that feature so I will ask you to proceed along some other line.

Mr. Fendler: All right. That is all.

Mr. Abeles: Just a couple of questions on your qualifications.

The Court: After my statement I do not see why you should question the witness further.

Mr. Abeles: Just on his general qualifications. I want to bring out something about this witness in answer to counsel's question—that is to say plaintiff's counsel's question as to what plays in pictures he produced.

Q. By Mr. Abeles: You answered Bird of Paradise, Irish Rose, Upstairs and Down, Peg of My Heart. Which of those—

Mr. Fendler: Not pictures, plays, counsel.

Mr. Abeles: You said plays and pictures, sir.

The Court: Counsel, if you want to make an objection, make it.

(Testimony of George R. Bentel)

Mr. Fendler: All right, your Honor. I object to this. I object to the question on the ground that the witness did not so testify, that he made those pictures. [425]

Mr. Abeles: I am going to read from the record at page 170. This is your question:

"Will you mention some of the plays and pictures produced by you during that time?"

"A. Bird of Paradise, Abie's Irish Rose, Upstairs and Down, Peg of My Heart."

Now, which of those pictures were produced by you?

A. Plays. I was general manager of the organization that produced the plays and sold the picture rights.

Q. But you did not produce those pictures yourself?

A. I haven't mentioned in that testimony the two pictures we made for the Morosco organization.

Q. Which were those?

The Court: Just a moment, Mr. Fendler; just a moment, please.

Q. By Mr. Abeles: You did not personally produce any of these plays, did you?

A. I was general manager of the organization that did produce them.

Q. But you did not say that before, did you? You said you produced them?

The Court: That is argumentative.

Mr. Abeles: Withdraw that.

Q. Now, Abie's Irish Rose was produced by Ann Nichols?

A. Initially by us, by the Morosco Company, Oliver [426] Morosco Company.

(Testimony of George R. Bentel)

Q. Was it ever produced on the stage by Oliver Morosco?

A. Absolutely, the initial production was in Los Angeles.

Q. For how long a time? A. 26 weeks.

The Court: That is immaterial.

Q. By Mr. Abeles: You said: "In 1928 we sold the motion picture rights to Paramount for \$125,000," for that picture.

The Court: From what page are you reading?

Mr. Abeles: 180.

Q. To the picture Abie's Irish Rose. Isn't it a fact that Ann Nichols sold those rights?

A. But we were the producers. She was the author.

Q. She never produced a play at any time?

A. She produced it in New York under her name but the original production and the interest was held by us.

Q. Now, you say the trade papers and newspapers announced that the same picture was purchased for Bing Crosby for \$350,000 and a percentage of the gross. You have no definite knowledge on that, have you?

The Court: Counsel, I am going to limit your cross-examination at this time. You had an opportunity to cross- [427] examine this witness when he was on the stand before and I am not going to permit you to go over that cross-examination again.

Mr. Abeles: I had to investigate the facts.

The Court: I understand, but at the same time you had an opportunity to cross-examine him and I am not going all over this picture again. I gave you gentlemen

(Testimony of George R. Bentel)

a full opportunity to examine these witnesses because I wanted to be fair with you.

Mr. Abeles: And you certainly were, sir. May I ask this one question. Before doing so, I want to say that I am attorney for 20th Century-Fox and have been for a number of years. Now, he testified to a transaction and I got the papers out and I find the transaction is not what he said it was. It is entirely different.

The Court: Isn't that a collateral matter?

Mr. Abeles: All right, sir. It is only as to his qualifications, Judge. That was all. He didn't know these facts actually. He took newspaper clippings and statements he heard from the air because he was only off in this case \$135,000.

The Court: As I said before, I will give you full opportunity to take the witness stand and testify. I think I will have to call you as a court's witness before we get through.

Mr. Abeles: That is all. [428]

Mr. Fendler: That is all.

Now, if the court please, there are certain corrections in the transcript upon which Mr. Knupp and I have agreed and I think Mr. Lewinson will concur.

Mr. Lewinson: I will concur in any correction that Mr. Knupp acquiesces to.

Mr. Fendler: At page 63, line 20. The third word is "figures" instead of "pictures." May it be so stipulated, Mr. Knupp?

Mr. Knupp: Read them all. We have gone over all of them. I will stipulate to all of them at once.

Mr. Fendler: All right, sir. Does your Honor have the place?

The Court: Yes.

Mr. Fendler: "Figures" instead of "pictures." And page 168, 13. That notice of copyright should be precisely as set forth on lines 16 and 17 of page 167.

The Court: Do you want to change that?

Mr. Fendler: That should be changed.

The Court: On page 68, and what line?

Mr. Fendler: Line 12. "Produced by Harold Lloyd Corporation, William R. Frazier, General Manager, copyright 1932." That should be followed by the words "Harold Lloyd Corporation" instead of being placed on the next line. In other words, the words "Western Electric Recording and Harold [429] Lloyd Corporation" are transposed. It should read "copyright 1932, Harold Lloyd Corporation, Western Electric Recording. Passed by the National Board of Review."

Reporter's transcript, page 170, line 9, should read "Before that time" and not "before my time." The word "that" should be substituted for the word "my."

And at page 288, line 7, instead of the numerals 916 it should be 9,160.

The Court: Just a cipher extra after the figure 6?

Mr. Fendler: Yes. The decimal point is in the wrong place.

Mr. Lewinson: That is one of the few papers, your Honor, where he is entitled to add a cipher.

The Court: Well, people out in your particular atmosphere place decimal points differently than I do so I am perfectly willing to have this brought up to date, to meet your atmospheric conditions.

Mr. Fendler: May it be so stipulated, Mr. Knupp, and do you have any other corrections?

Mr. Knupp: The only one I suggested was on page 281, where it appears the exhibit offered by the plaintiff was in fact offered by the defendant. I don't know that it makes any difference.

The Court: I don't know what difference it makes, do you? [430]

Mr. Knupp: Except it is the plaintiff's evidence instead of defendant's.

Mr. Fendler: We will stipulate for any purpose you may want to use the exhibit for it may be deemed a plaintiff exhibit and offered on behalf of the plaintiff as well as the defendant so it becomes a joint exhibit.

Mr. Knupp: We did not offer it. It was offered by the plaintiff as part of the plaintiff's case.

The Court: In other words, it should be marked Plaintiff's Exhibit D.

Mr. Fendler: That is satisfactory.

The Court: It will be so corrected.

Mr. Knupp: The other changes that counsel suggests are agreed to, if the court please.

Mr. Fendler: Now, I will also enter into a stipulation with you, Mr. Knupp, at this time that the figures which you have previously given the court on So's Your Uncle of \$208,812.92 shall be deemed to be the gross proceeds to until and including July 14, 1945, of the motion picture So's Your Uncle. And it is my understanding that you will stipulate that the negative cost of \$104,693.42 includes an overhead item of 25 per cent or \$26,172.00 roughly.

Mr. Knupp: I don't know that that is so, if the court please. I prefer to prepare a stipulation in which we

broke down that negative cost into the various items. [431]

The Court: Gentlemen, on this question of profits on this picture, there is only one item that the court is interested in. If you gentlemen cannot agree on that then we will have to refer the question to a special master. The court is only interested in one question: What were your profits? Your gross receipts and expenses mean nothing to the court. Now, if you cannot stipulate on that we will take care of it in another way.

Mr. Abeles: I understand Mr. Fendler suggested—

The Court: I am not going to argue about what is overhead.

Mr. Abeles: He spoke to Mr. Ward about it and I think they are trying to get together on that.

Mr. Fendler: That is correct.

The Court: That is the only figure I am interested in, gentlemen. Can you agree on that figure?

Mr. Fendler: We can agree, your Honor.

The Court: I am not interested in the amount of gross receipts nor what was spent for overhead and other expenses. I am interested in what the profits were.

Mr. Fendler: If your Honor please, for the same reason that counsel read certain matters into the record and I agreed to them this morning, it is a matter of very easy computation to find out how much was actually out-of-pocket expense and how much is arbitrary book-keeping charges for [432] overhead. That is the figure I am trying to secure. We feel it is both relevant and competent and they are trying to supply that figure, so I am going to ask that your Honor permit that figure to go into the record along with the other figures and

we will arrive at a figure claimed by Universal to show their profits.

The Court: In other words, there are certain items you claim should not be allowed?

Mr. Fendler: I am not going to stipulate that an item is profit where there is an overhead item of \$26,000 which was not out-of-pocket expense. And I think that your Honor should be advised of that. That is all.

The Court: Even in running a law office overhead is a big item in your expense account.

Mr. Fendler: I just want the record to reflect the facts, your Honor. I understand we will have no dispute as to what the facts are.

The Court: Then suppose you proceed.

Mr. Fendler: What is the overhead figure, Mr. Knupp?

Mr. Knupp: I couldn't say. I cannot tell because the figures are presented this way. I will say to the court that I can agree with Mr. Fendler and we will stipulate on it in a written stipulation and file it with the court.

Mr. Fendler: We will either do that or put it in the record. [433]

Mr. Knupp: We do not concede, of course, that the overhead is not a proper charge.

The Court: And you will have some difficulty in convincing the court it isn't a proper charge because I have paid too much overhead in my own time.

Mr. Fendler: Now, those are the only corrections in the record and I assume you are ready to proceed.

Mr. Lewinson: Mr. Fendler, in the interest of accuracy there are a few more detailed corrections and I will call them to your attention later.

Mr. Fendler: We will stipulate to them.

Mr. Abeles: Mr. Hirleman, please.

GEORGE A. HIRLIMAN,

called as a witness on behalf of the defendant, being first duly sworn, was examined and testified as follows:

The Clerk: State your full name.

The Witness: George A. Hirliman.

Direct Examination

By Mr. Abeles:

Q. Mr. Hirliman, you came to Los Angeles at my request by airplane from New York? A. Yes, sir.

Q. For what period of time have you been connected in any way with the motion picture industry?

A. Approximately 30 years. [434]

Q. Will you please relate in what capacity from time to time?

A. I started off in the laboratory business. Spent about 10 years in that. Was in production for about eight years and the balance in distribution.

Q. Now, what companies are you with at the present time and in what capacity?

A. I am the president of the International Theatrical and Television Corporation which owns about 10 others who distribute both 16 and 35.

Q. And they buy, do they, they buy re-issue and re-make rights to various motion pictures?

A. Yes, they do.

Q. Let me ask you this: You were a motion picture producer for a number of years? A. Yes, sir.

Q. For how many years?

A. Approximately 10 years.

Q. For whom did you produce?

A. Republic, M-G-M, Fox, RKO, Grand National, and independents.

(Testimony of George A. Hirliman)

Q. And I understand your company is considered the largest, if not one of the two largest companies, in the United States that purchase re-issue and remake rights to motion pictures. [435]

A. Yes, sir.

The Court: That is your present business?

The Witness: That is part of my present business, yes.

Q. By Mr. Abeles: What connection have you with these companies that you mentioned that buy re-issue and remake rights to motion pictures?

A. The present company—I have United Screen Attractions. My parent company owns 100 per cent.

Q. Are you an officer of those companies?

A. I am in some of these subsidiaries.

Q. Have you holdings in the various companies?

A. My parent company owns—

Q. Do you have an interest in the parent company?

A. Yes, sir, a substantial one.

Q. I mean, are you a sort of managing director of these companies? A. I am.

Q. For what length of time, sir, have these companies been buying re-issue and remake rights to motion pictures?

A. Approximately three and a half or four years.

Q. Have they bought the re-issue and remake rights to various pictures, Gaumont, British—re-issue rights of British-Gaumont?

A. Not the present company. The one I sold out about eight months ago did. [436]

(Testimony of George A. Hirliman)

Q. Did they buy the rights to the various famous pictures that had been produced by that company, re-issue rights? A. Yes, they did.

Q. Did they also buy the re-issue rights to the famous pictures produced by Selznick International?

A. Yes, seven of them.

Q. Did you buy part of the remake rights to those pictures, too? A. Yes, sir.

Q. All right. Throughout the world, is that right?

A. To the Selznick pictures?

Q. Yes. A. Yes.

Q. And very many famous pictures were involved, were they not? A. Six out of the seven.

Q. Will you name some of them.

A. A Star Is Born, Made for Each Other, Nothing Sacred, Little Lord Fauntleroy, Becky Sharp, which had another title, Vanity Fair, Dancing Pirate, and The Young in Heart.

Q. And Gaumont-British. Will you name some of those.

A. Lady Vanishes, Transatlantic Tunnel, To the Victor.

Q. Was the Lady Vanishes a prize winning story?

A. Yes, sir. [437]

Q. Go on. A. Do you want some more?

Q. How many pictures were there you bought such rights from Gaumont-British? A. 35.

Q. And Selznick, you said you bought how many?

A. Seven.

Q. Now, Harold Roach's pictures. How many pictures did you buy from Harold Roach, the re-issue rights of his comedies?

(Testimony of George A. Hirliman)

A. Approximately 350 to 400 two-reel shorts, and features.

Q. Did those include Laurel and Hardy?

A. Yes, sir.

Q. Did it include the original Topper story with Cary Grant and Constance Bennett?

A. Not the story re-issue rights.

Q. But the picture had Cary Grant and Constance Bennett in it?

A. Yes, sir.

Q. And you have purchased re-issue rights to the Samuel Goldwyn Pictures?

A. The company I had eight months ago did.

Q. How many pictures did you buy?

A. 34. [438]

Q. And how much do you approximate the cost of production of those 34 pictures was?

Mr. Fendler: Objected to as immaterial and outside the issues of this case.

The Court: He is qualifying the witness. I am going to admit the testimony.

Q. By Mr. Abeles: Approximately how much?

A. The Goldwyn pictures?

Q. Yes. A. About \$100,000,000.

Q. \$100,000,000? A. I would estimate that.

Q. And the Roach pictures, how much do you estimate for those?

Mr. Fendler: Same objection.

The Court: Same ruling.

Q. By Mr. Abeles: The cost of producing those pictures?

A. \$25,000,000.

Q. And how much for the British-Gaumont pictures, the cost of production?

A. \$30,000,000. [439]

(Testimony of George A. Hirleman)

Now, I understand from Samuel Goldwyn you bought all the pictures made by United?

A. Released through United.

Q. I am sorry, released through United Artists.

A. Yes.

Q. You bought the re-issue rights for the United States and Canada? A. Yes, sir.

Q. Name some of the outstanding ones.

A. Wuthering Heights, Dead End, Stella Dallas, Hurricane, Marco Polo, The Westerner, The Cowboy and the Lady, and all of Eddie Cantor's pictures. In addition to those I mentioned, all the Ronald Colman pictures that were made for Mr. Goldwyn and all the Gary Cooper pictures that were made for Mr. Goldwyn. Wedding Night.

Q. That is Gary Cooper? A. Yes.

Q. And Raffles, the amateur cracksman?

A. Yes.

Q. Did you also purchase the re-issue rights of 23 pictures and re-make rights and story rights from Tiffany? A. Yes.

Q. Productions? A. Yes.

Q. Name some of the pictures. [440]

A. Mr. Antonio by Booth Tarkington, Hotel Continental, The Lost Zeppelin.

Q. And in addition to those pictures there were 35 Ken Maynard westerns? A. Yes, sir.

Q. How about the Ursula Parrott pictures?

A. I don't recall the titles. She is the author of one.

Q. How about Journey's End?

A. Journey's End was included in the deal and we have the negative rights to the original picture.

(Testimony of George A. Hirleman)

Q. How about *The Third Alarm*?

A. Yes, *Third Alarm*, too.

Q. How about *Harold McGrath*?

A. I recall the author but not the title of the picture.

Q. *X Marks the Spot*?

A. Well, we bought that one and sold it.

Q. *Aloha*? A. Also *Aloha*.

The Court: Are you going through all the pictures that were ever made?

Mr. Abeles: Just one more question.

Q. You also bought from *Chester Field*, you told me, *Betty Grable's* pictures and *Donald Cook's* pictures, is that correct? [441]

A. One *Betty Grable* picture.

Q. And you bought various pictures from *R. K. O.*, I believe, well known pictures? A. Yes.

Q. You have seen it since you have been here—you have seen the picture *Movie Crazy*—the plaintiff's picture, have you not? A. Yes, sir.

Q. And you also saw the *Columbia* short, *Local Boy Makes Good*? A. Yes, sir.

Q. And you saw the sequence in the defendants' pictures, too? A. Yes, sir.

Q. *So's Your Uncle*? A. Yes, sir.

Q. Now, in your opinion, has the *Harold Lloyd* picture *Movie Crazy* and re-issue or re-make value today, or did it—let me put it this way: Did it have any re-issue or re-make value before the use of the sequence—the magician's coat sequence in the defendants' picture *So's Your Uncle*, in your opinion?

A. In my opinion as to the re-make value—I don't know as to the re-issue value, but it had no value to me.

(Testimony of George A. Hirliman)

Q. Well, as to the re-make value in your opinion would [442] you buy it for re-make?

Mr. Fendler: Objected to on the ground he said he didn't know whether it had a re-make value, and in addition to that it doesn't make any difference whether it had any value to the witness or re-make value at all.

The Court: I think the objection is good as to what was valuable to him. He has expressed an opinion as an expert.

Q. By Mr. Abeles: Now, on the re-make value, in your opinion how much, if anything, would the re-make value of that picture be worth without the use of the sequence by Universal?

Mr. Fendler: Objected to on the ground he said he didn't know.

The Court: We are not interested in what it would be worth without that sequence.

Mr. Abeles: I have to put it both ways.

Mr. Fendler: The objection is he already testified he doesn't know what the re-make value was so he is not qualified to answer the question.

The Court: Is that true?

The Witness: I was assuming you were asking the value insofar as I was concerned.

The Court: We do not want what it is worth to you or whether you would buy it. What we want is your opinion as a dealer as to the value of these pictures for remake and re- [443] issue purposes.

The Witness: Well, the answer to that is no.

The Court: How about the re-make value?

(Testimony of George A. Hirliman)

The Witness: Well, I never buy for re-make purposes. I only buy first for re-issue and if it has re-make value that adds value to me, but if it had only re-make value I would not be interested in it.

The Court: So you don't know?

The Witness: I don't know so far as anyone else is concerned.

The Court: But you have no opinion as to the re-make value?

The Witness: No, sir.

Q. By Mr. Abeles: You said you would not buy the re-issue rights to that picture?

The Court: We are not interested in what he would buy.

Mr. Fendler: That is immaterial.

The Court: We are only interested in your opinion of value.

Q. By Mr. Abeles: In your opinion, then, has the re-make value of that picture been injured in any way by the use of this sequence in the Universal picture?

Mr. Fendler: Objected to on the ground it is immaterial and on the further ground if he doesn't know whether it has a remake value he is not qualified to answer the question. [444]

The Court: I will receive the answer for what it is worth.

The Witness: Would you ask that again?

Q. By Mr. Abeles: In your opinion does the use of this magician's coat sequence in the Universal picture damage the re-make value to that motion picture?

(Testimony of George A. Hirleman)

Mr. Abeles: If your Honor please, the distinction is this: In this case I am asking the witness to testify to a [447] fact.

The Court: Just a moment, counsel. I have ruled. In the first place, it is a collateral matter and in the second place, if the re-issue rights of a picture were sold we do not know whether it was comparable to the picture in issue. It does not mean anything to the court.

Mr. Abeles: I understand. I respectfully take an exception to that.

The Court: You do not have to note an exception to the court's rulings under the new Rules, counsel.

Mr. Abeles: I know that.

Q. After you purchased the re-issue rights to the motion picture *Safety Last*, were you able to sell it to one single exhibitor in the United States?

Mr. Fendler: That is objected to upon the ground that *Safety Last* was a silent picture made in 1923 and when the re-issue rights were sold in 1932 we had talking pictures and a silent picture could not possibly be sold as a re-issue in the days of talking pictures. The question is objected to as incompetent, irrelevant and immaterial and outside any issue in this case.

Mr. Abeles: That is why I told your Honor I had to put Mr. Lloyd on the stand first.

The Court: Objection sustained.

Mr. Abeles: Mr. Lloyd testified that that picture had [448] very valuable re-issue rights.

The Court: The picture involved is the only one we are interested in.

Mr. Abeles: That is all, sir.

(Testimony of George A. Hirliman)

Cross-Examination

By Mr. Fendler:

Q. Mr. Hirliman, what is the outstanding company which deals in re-issue rights today?

A. Film Classics.

Q. You are not affiliated with that company, are you?

A. Not for the past eight months.

Q. And this other company with which you are not affiliated is the one that has acquired these various re-issue rights in the pictures to which your attention has been directed, is that correct?

A. Will you say that again?

Q. I say it is Film Classics which acquired the interests—acquired the re-issue rights in these pictures which you have made, is that correct?

Mr. Abeles: I object to it on the ground the witness testified he was with the company that acquired them and he later sold the company.

Mr. Fendler: I will connect it up, your Honor.

The Court: Will you read the question.

(Question read.) [449]

Mr. Fendler: If it is unintelligible I will withdraw the question.

Q. It is Film Classics which acquired the re-issue rights to the pictures that you have named and not this International Theatrical and Television Company?

A. Of the first four mentioned that is so. All thereafter were acquired in the name of International.

(Testimony of George A. Hirleman)

Q. Well, now, doesn't the Film Classics, Inc., own the Goldwyn pictures?

A. I said the first four deals which includes Gaumont-British, Selznick and Goldwyn.

Q. Those are the big ones? A. That is right.

Q. Now, Mr. Alperson formed Film Classics, did he not? A. No, sir.

Q. Mr. Alperson is the present general manager of Film Classics, is he not? A. I think so.

The Court: Is Film Classics the present company?

The Witness: That is the company.

The Court: The original company?

The Witness: Yes.

The Court: What is the business of that company?

The Witness: Re-issuing old pictures. [450]

The Court: And has that developed into quite a business?

The Witness: With that company, yes.

The Court: But there are other companies in the same business?

The Witness: Smaller ones, yes.

The Court: That are engaged in buying and selling re-issued pictures?

The Witness: Yes, sir.

The Court: Re-issue rights.

The Witness: Yes, sir.

The Court: And there is a demand for those re-issues; otherwise you would not buy them?

The Witness: That is right.

The Court: And when you re-issue them do you re-sell them or do you redistribute them yourselves?

(Testimony of George A. Hirliman)

The Witness: Generally we distribute them ourselves.

The Court: So then you buy them for the purpose of redistribution?

The Witness: Yes, sir.

The Court: It is true then that pictures that have seen their day, in a sense, are re-issued and are redistributed to your advantage?

The Witness: If they are not dated by either wardrobe or costumes or technique. [451]

The Court: But you expect in buying re-issue rights of pictures to make a profit?

The Witness: Yes, sir.

The Court: And you buy them with that in view?

The Witness: Yes, sir.

The Court: And as you say there are others engaged in the same business?

The Witness: Yes, sir.

The Court: So it has been a business that has developed out of the moving picture industry?

The Witness: That is correct.

The Court: With a view on the part of the producing companies to salvage what they can from them after originally being issued?

The Witness: Yes, sir.

The Court: So in a sense you act as sort of a salvage man?

The Witness: That is right.

The Court: You bring in some additional profits to the owners of those films?

The Witness: Yes, sir.

The Court: How long has that practice been going on?

(Testimony of George A. Hirleman)

The Witness: There has always been a certain amount of re-issue business but it became more profitable and more common with the war when there was a shortage of film and pic- [452] tures.

The Court: As a matter of fact, isn't there a demand for that type of pictures in certain theatres?

The Witness: If they are of the classic type. I mean a picture like *Wuthering Heights* or *Lady Vanishes*. They could probably be issued four different times.

The Court: Aren't there some theatres that make a business of showing only old pictures over again?

The Witness: What they call the art theatres, which only play the classics or foreign pictures or things like that. For instance, a picture which I referred to, *Lady Vanishes*, is presently playing in New York at Little Carnegie, which is the finest art theatre in New York. And I am sure I am safe in saying that is probably the eighth time it has played there.

The Court: Well, aren't there some theatres that are still displaying some of the old silent pictures?

The Witness: Just as a sort of—like they go back so far they are so old they are funny.

The Court: They are sufficiently funny to attract considerable business?

The Witness: There is a very limited audience for that sort of thing. They are usually gagged with sound. Sound has been added to them with gags.

The Court: The producers always retain their films [453] after they have had their run throughout the country? They store them in fireproof vaults as a rule, do they not?

(Testimony of George A. Hirliman)

The Witness: You mean the regular run of the mine picture.

The Court: Yes.

The Witness: Yes, sir.

The Court: And that is the stockpile from which you select certain pictures that you feel have re-issue value?

The Witness: Well, it doesn't exactly work that way. The large producing companies very rarely or would not sell their pictures for re-issue to a smaller company like I am. It would only be individual producers. Frankly, the whole thing came about in the sense of outright sales because they could take capital gains and realize that much out of them, but a big company would never sell us pictures.

The Court: You mean they would not sell them in order to acquire capital gains?

The Witness: An individual would who had a picture and he had gotten his run out of it and gotten his money. He would sell for whatever the residual value was, even for a comparatively small amount of money in relation to its cost because he could keep 75 per cent of it.

The Court: Well, whatever a picture sells for is only a small part of its original cost?

The Witness: Very small. [454]

The Court: Do you have any rule of thumb that you go by in purchasing pictures, or is it just a question of horse trading?

The Witness: I could give you the high and low of what I bought in re-issue.

The Court: Is it simply a question of horse trading?

(Testimony of George A. Hirliman)

The Witness: It is a question—there is no rule of thumb. It is a question of quality of the picture. We paid Mr. Goldwyn probably—

Mr. Fendler: Just a minute—well, go ahead.

The Witness: We paid Mr. Goldwyn probably 50 times what we paid for the Tiffany pictures.

The Court: Then really when you want a picture it is simply a question of horse trading?

The Witness: Yes, sir.

The Court: Dickering back and forth?

The Witness: Yes.

The Court: You find a picture which you feel has a re-issue value and then you try to buy it?

The Witness: Yes, sir.

The Court: Now, do you deal directly with the owners of those films or do you generally deal through brokers?

The Witness: Generally directly with the owner.

The Court: But there are brokers who engage in that business? [455]

The Witness: Not that I know of.

The Court: That is all.

Q. By Mr. Fendler: Now, Mr. Hirliman, you testified that the re-issue business became quite in vogue after the war because of the shortage of film and stock and so on. That is during the years 1943 and 1944 and 1945 it really began to come into its own, isn't that right?

A. Yes, sir.

Q. And another reason for that would be, would it not, that enough time had elapsed from the introduction of talking pictures in 1930 to allow a sufficient span of time to go by that there might be a new generation of

(Testimony of George A. Hirliman)

theatre goers who had not seen the picture formerly, isn't that correct? A. Yes, sir.

Q. Now, you did not mean to testify that comedies do not have substantial re-issue rights, did you?

A. I don't recall that I did. I don't recall being asked that question.

Q. Well, I understood you to say something about comedies being dated. One of the outstanding comedies was Hal Roach's Topper? A. Yes, sir.

Q. That was a comedy, wasn't it? A. Yes, sir.

Q. And the estimated gross on Topper on re-issue in [456] this country alone is \$250,000, isn't it?

Mr. Abeles: Your Honor, I object to that as incompetent, irrelevant and immaterial. I did not bring out any figures at all because of your Honor's ruling. I purposely kept away from that.

The Court: He is simply testing the qualifications of the witness.

Mr. Abeles: I did not ask about comedies purposely. I purposely kept away from stories. I said where they have an outstanding story like Topper.

The Court: This is a comedy involved here, isn't it?

Mr. Abeles: Yes.

The Court: The court is interested in this witness' testimony as to whether there is any re-issue value in a comedy. That is really what I am interested in. Let me ask this question: Comedies have re-issue value the same as any other type of picture, do they not?

The Witness: It all depends, your Honor, on what they were based on.

(Testimony of George A. Hirliman)

The Court: Well, if they are still funny and make people laugh and people want to see them they are still valuable, aren't they?

The Witness: Would you like me to enlarge on that and explain what I mean?

The Court: Yes. [457]

The Witness: The picture Mr. Fendler refers to, *Topper*, is from a very famous novel by a very famous author whose books today are still in great demand. When I referred to the other type of picture—I don't recall that I used the word "comedy" but if I did I meant a picture that was made up of a lot of situations and there was no original famous play or story or stage play or something which would more or less live forever. I don't think *Topper* comes into the classification of a comedy in the sense of a situation comedy. That is a very famous story and the best answer to it is that to my recollection Mr. Roach continued to make *Topper* series of the same author for, I don't know how many more, but I think two or three more.

Q. By Mr. Fendler: Now, you don't wish to testify, do you, Mr. Hirliman, that the only valuable motion pictures are those which are predicated or based upon plays which have been produced, or novels which have been published, do you? A. No.

Q. In fact, some of the most famous moving pictures, both in the silent and talking picture days, have been originals which have been developed at the studios, isn't that right? A. And were re-issued?

Q. I am not talking about re-issue.

A. I am not testifying on new pictures. I am testifying [458] ing with reference to re-issues.

(Testimony of George A. Hirliman)

Q. You testified, Mr. Hirliman, the reason Topper was valuable, as I understood your testimony, was because it was based upon a novel which even is being sold today. A. That is right.

Q. And your testimony was that the reason that that was valuable was because it was based upon a novel?

A. That is one of the reasons.

Q. Now as a matter of fact some of the most valuable moving pictures have been developed from original stories, haven't they? A. Yes.

Q. And in fact studios have paid as high as \$100,000 for an original story?

Mr. Abeles: Object to that.

The Witness: I don't know about that.

Mr. Abeles: That has nothing to do with re-issues.

The Court: I don't know what you are gaining by this cross-examination. I have heard this witness' testimony.

Mr. Fendler: If your Honor please, I would like to develop further the re-issue situation.

The Court: All right, proceed.

Mr. Fendler: I shall not ask any further questions along the previous line.

The Court: Let us get down to the issues. [459]

Q. By Mr. Fendler: Now, there are a number of comedies which have been remade several times, are there not? A. I don't recall them at the moment.

Q. Ruggles of Red Gap. Does that refresh your recollection?

The Court: Mr. Fendler, you objected a moment ago because you said this man was not qualified to testify with reference to remakes.

(Testimony of George A. Hirliman)

Mr. Fendler: I am not asking about the value of remakes. I am attacking his testimony that comedies can only be shown once, in effect, and in order to develop the fact that some of the most successful—

The Court: Proceed.

Mr. Fendler: Will you read the question.

(Question read.)

The Witness: You have the same situation there as you have with Topper. You have another famous author.

Q. By Mr. Fendler: Have any changes been made in the two or three different productions of Ruggles of Red Gap from the original author?

A. I wouldn't know—I didn't see it.

Q. Well, it is a fact, is it not, Mr. Hirliman, that the remake of a comedy can be much more successful and profitable financially than the original?

Mr. Lewinson: That is objected to. [460]

The Witness: It isn't to my knowledge.

Mr. Lewinson: That is objected to.

Q. By Mr. Fendler: Now, isn't it a fact that the remake of Ruggles of Red Gap with Charles Laughton grossed approximately twice as much as the original production of Ruggles of Red Gap?

The Court: Just a moment, counsel. I am not going to permit you to have a discussion concerning these various pictures. If I do I will have to spend the next two weeks at the studios looking at them.

Mr. Fendler: May I state to your Honor that the question in your Honor's mind has apparently been, from the start of the case, whether the values placed on the re-issue rights and remake rights by Harold Lloyd did not have too many ciphers. Now we desire, if your Honor

(Testimony of George A. Hirleman)

please, to show that the figures which Lloyd placed on the re-issue and remake rights are ultra-conservative and that judged by other comedies have done, both on re-issue and remake, that there are not too many ciphers involved.

The Court: Counsel, do you ever expect to get such an admission from opposing counsel's experts?

Mr. Lewinson: This witness has not testified with reference to remake values.

The Court: I realize that. I also realize that experts are in a sense associate counsel in a case and I do not expect [461] counsel to put an expert on the witness stand unless he knows what he is going to testify to in advance. Otherwise they would not put them on. I understand that thoroughly from my own experience as a practicing attorney. I feel that we are going to simply have a conflict of testimony that the court is going to have to reconcile in its own mind.

Mr. Fendler: May I offer the evidence, if your Honor please? Now, I propose to prove by this witness that the figures which Mr. Lloyd gave, judged by the standard of the estimated gross profits on re-issues of these pictures which this company acquired—

The Court: Counsel, can't you see the court's viewpoint after everything I have said? I will say it again. These figures of \$100,000, \$200,000 are entirely out of line. You might as well mention the national debt.

Now, if you want to proceed along the same line, I will give you all of the leeway you want. You may fill up the record with it and make it as large as you want. I will sit here and listen, but as far as having any material weight with this court is concerned, it will not.

(Testimony of George A. Hirliman)

I have heard this witness' testimony. I have heard his qualifications. He is brought here by opposing counsel to testify that they had no value or they would not have brought him from New York. They knew what he was going to testify to. The witnesses you put on will testify as to certain [462] values. You would not put them on unless you knew they were going to so testify.

Mr. Fendler: May I ask three final questions, your Honor?

The Court: You may, yes.

Q. By Mr. Fendler: The consideration paid by your company to Samuel Goldwyn was \$1,500,000 or thereabouts, for the re-issue rights of the 30 odd pictures which you bought—of which you bought the motion picture re-issue rights, is that right?

Mr. Abeles: I object to it on the ground I never brought that out.

The Court: The witness so testified.

Mr. Abeles: I never brought that out. I could show we bought some for \$25,000.

The Court: I don't know what the figures were but he gave a long list of figures.

Mr. Abeles: Those were production costs of the original pictures. I never went into the figure that he has given now. Now, I will have to go through all of the figures and bring that out.

The Court: Proceed, gentlemen.

Q. By Mr. Fendler: What is the answer?

A. The figure is \$1,350,000.

Q. \$1,350,000 for the Goldwyn pictures? [463]

A. Yes.

(Testimony of George A. Hirliman)

Q. Now, with that purchase from Goldwyn—you say that was made by Goldwyn partially to take advantage of the capital gains tax?

A. No. That is not an outright purchase. I said some producers do that.

Q. He just leased the pictures to you, is that correct?

A. Right.

Q. And you paid him \$1,350,000 for the lease?

A. 35 pictures.

Q. And you paid Selsznick \$100,000 for the re-issue rights to some of the Selznick pictures?

A. The outright purchase.

Q. You purchased some of the Selznick pictures for \$100,000 or more, is that correct? A. Right.

Q. And the estimated gross on the re-issue of Topper is in excess of \$250,000 in this country alone, is it not?

Mr. Abeles: Object to that.

Mr. Fendler: On the re-issue.

Mr. Abeles: How would he know that?

The Court: I don't know. You and he both are pretty good testifiers.

Mr. Abeles: It is just opening all of this up. Go [464] ahead.

The Witness: That figure is correct.

Q. By Mr. Lewinson: That is the third question, Mr. Fendler.

Mr. Fendler: Well, I may not confine myself to three.

Q. And the estimated gross on the re-issue of Topper is another \$100,000, is it not?

Mr. Abeles: The profits he made are immaterial. The question is what he paid for the rights. If he made \$1,000,000, what does that mean? What difference does that make. I do not see that it has anything to do with it.

(Testimony of George A. Hirliman)

The Court: Counsel, as far as these figures are concerned I am letting him build up his record because when we get through with this case neither one of you are going to be satisfied. I will let you build up your record but I know that I cannot satisfy either side in any decision that I render. I have expressed myself several times with reference to this matter. It has no weight with me, because what one picture might bring is no indication of what another picture might produce. If counsel wants to bring in these big pictures I will permit him to do so and I will give you the same privilege. Proceed.

Q. By Mr. Fendler: Now, Mr. Hirliman, when pictures are re-issued by Film Classics or by any of the other organizations or by the original producers today, they are not re- [465] issued as revivals or advertised as revivals, are they? A. Sometimes.

Q. Well, isn't it the custom to advertise and exploit the re-issue of a picture by using a brand new publicity campaign and with ads which do not reflect the fact that the picture was made 10 years back?

A. That is not true in the case of the major companies.

Q. Well, when it comes to Film Classics, which bought all of these Goldwyn and Selznick and other pictures, their publicity and paid advertising does not reflect that the re-issue is a revival of an old picture?

The Court: Counsel, why should I be interested in that? What does that tend to prove or disprove in this case? It does not tend to disprove or prove anything.

Q. By Mr. Fendler: Now, do the major companies re-issue their own productions at the present time?

A. In several instances they do.

(Testimony of George A. Hirliman)

Q. And when a major company re-issues its own productions that production is distributed by the same distributing organization with the exchanges throughout the country which distributed the picture originally, is that correct?

A. Yes, sir.

Q. And the same accessories, press books, mats, etc., are still used in the new campaign, is that correct?

A. Not necessarily. [466]

Q. Can be either one or the other?

The Court: I don't care about that one way or the other, counsel. I am interested in Mr. Abeles' and Mr. Fendler's knowledge of the industry but I do not want to have what might be called a quiz course here with the intention of arriving at a certain objective. I am not interested in what you know about the details of the business. I have stated before and I will state again that I am trying to determine damages. I would like to know what the picture in controversy was worth before the defendant's picture was exhibited and what it was worth afterwards. Those are the things I am interested in. Whether I am right or wrong I don't know, but as you stated in your brief this particular situation has not been brought up in any other case.

Mr. Fendler: I will ask no further questions then.

Mr. Abeles: I have just a couple of questions.

Redirect Examination

By Mr. Abeles:

Q. You testified—rather Mr. Fendler brought out these enormous sums which were paid for the re-issue rights for pictures that are based upon novels and stage plays of famous stories. Now, let us get to the comedies,

(Testimony of George A. Hirleman)

which I did not ask you about. What did you pay for the 411 Hal Roach comedies? [467]

Mr. Fendler: Objected to as immaterial. The purchase of re-issue rights to two-reel comedies produced in silent picture days 25 years ago can throw no light on this.

The Court: Objection overruled.

Q. By Mr. Abeles: What was the type of picture you bought from Hal Roach?

A. In the first place they were all sound.

Q. How many Laurel and Hardy pictures?

A. You are talking about features or shorts?

Q. Features.

A. Eleven features of which seven were Laurel and Hardy features.

Q. And one was Topper? A. Yes.

Q. And there were 400 two-and three-reel shorts?

A. Yes, sir.

Q. What did you pay for those?

Mr. Fendler: Objected to on the ground the purchase of sound pictures—

The Court: Just a moment, counsel. I am going to have to invoke a rather strict rule here. If you have anything to say, please direct your remarks to the court.

Mr. Abeles: I always do that.

The Court: I call counsel's attention to our previous session which became more or less stormy because counsel con- [468] tinued to argue back and forth. The objection is overruled.

The Witness: Will you ask the question again, please?

Q. By Mr. Abeles: How much did you pay for the 411 pictures? A. \$80,000.

(Testimony of George A. Hirlihan)

Q. Now, in your opinion—I should really bring this out—in your opinion is the sequence, the magician's coat sequence in the Harold Lloyd picture *Movie Crazy* a material factor to that picture?

A. No, sir, it is not.

Mr. Fendler: Just a moment. I object to that as immaterial.

The Court: Counsel, he can testify it should have been left out of the picture, but I saw the picture and he can testify that way if he cares to, but as far as this court is concerned you are wasting your time in bringing out testimony that that sequence was of no consequence in that picture. I saw the picture and I have my own views as to the value of that sequence.

Mr. Abeles: That isn't what I am bringing out. Give me a chance. I did not ask that question. I said was it a material factor in the picture. Was it related to the story in the picture? Does it carry through? Let me ask him that. Give me your answer on that, Mr. Hirlihan.

Q. In other words, in your opinion, is that sequence [469] forced into the picture or is it worked through into the picture in the regular line of the picture?

A. I can't answer that question yes or no. I believe that the sequence could be left out of the picture and the story value would not be materially affected.

Q. Why?

A. Because, to be specific about it, when you are at that sequence the character, Harold Lloyd, does not meet with the head of the studio, which would have made good sense at the end of the story, and when he promotes him and gives him the job he doesn't even know about it. It

(Testimony of George A. Hirliman)

could be left out of the picture but he still could be rewarded at the end and get his job and so forth and nobody would ever know whether that was in there or not.

Q. You mean there is nothing connected with that sequence with what was going on between Harold Lloyd and the producer? A. Yes, sir.

Q. Nothing to show the wife ever told the producer and the producer ever found it out?

A. That is right.

Q. Now, to your knowledge, and this is the last question, to your knowledge do you know of any picture containing a secondary story—that is a story that is not a famous or outstanding story, whether original or otherwise, [470] where the material was written for a comedian, situation material written for a comedian like Lloyd or Chaplin or Buster Keaton that was ever remade in one single one? A. No.

Mr. Abeles: That is all. [471]

Recross Examination.

By Mr. Fendler:

Q. Would it surprise you to know that Danny Kaye is now acting in a production by Goldwyn of a remake of Harold Lloyd's *Milky Way*?

A. That also was taken from a play, wasn't it?

Q. Was the motion picture the same as the play?

A. I don't remember.

Q. You don't remember whether it was or not?

A. No, sir.

Mr. Fendler: That is all.

The Court: We will take a recess at this time, gentlemen, until 2:00 o'clock.

(Whereupon, at 11:55 o'clock a. m., a recess was taken until 2:00 o'clock p. m. of the same day.) [471]

Afternoon Session. 2:00 P. M.

The Court: You may proceed, gentlemen.

Mr. Abeles: If your Honor please, I would like to offer in evidence lines 19 to 26 inclusive of page 49, and lines 1 to 3 inclusive on page 50 of the deposition of

JEAN W. YARBROUGH.

Mr. Fendler: That is so stipulated, and I suggest you read it into the record.

The Court: What is it you are offering in evidence?

Mr. Fendler: Mr. Abeles is offering in evidence a portion of the deposition of Jean Yarbrough, the producer of the Universal motion picture *So's Your Uncle*, which is a deposition on file in this case. I have no objection to that being received in evidence. I think it is a proper part of the case.

The Court: Very well, you may read it into the record.

Mr. Abeles: This is a question by Mr. Fendler:

"Q. Now, were you aware of the fact, Mr. Yarbrough, that this magician's coat sequence had, in substance, been used in a previous motion picture?

"A. I was told by Mr. Bruckman that material of this nature had been used two or three times, over a period of years, previously. [472]

"Q. Did he tell you in what pictures?

"A. He told me that in some Columbia picture that he had been associated with they had done something along that line and that some years back Lloyd had done something of that nature."

Now, just one other thing and then I am through. The next is on page 63. I would also like to offer in evidence part of Mr. Bruckman's deposition, starting on line 17 of page 63, and ending on line 24 on page 64.

This is only for the purpose of qualifying Bruckman, to show his qualifications. The reason I am not bringing him here is because his mother is very ill.

Mr. Fendler: I have no objection to your reading it into evidence, Mr. Abeles.

The Court: I would prefer you to read it because I want to get the continuity of it along with the rest of the evidence.

Mr. Abeles: "Q. How long have you been engaged in some phase of the motion picture business?

"A. Since 1919.

"Q. Will you, for the purpose of the record, outline your moving picture experience.

"A. As a sports writer on the Los Angeles Examiner, I did free-lance title work on the side during 1919, 1920 and the early part of 1921. [473]

"Q. When you speak of free-lance writing, you mean writing the subtitles for what were then silent motion pictures?

"A. That is correct.

"Q. Go right ahead.

"A. In the spring of 1921, I left the Examiner and went to work as a gag man and writer for Warner Bros. In the fall of the same year, I went to work, in the same capacity, with Buster Keaton.

"I remained with Keaton for probably a year. Then I went with Metro Pictures for a brief period; then back with Buster Keaton for possibly another year. From Keaton I went to Mack Sennett, also as a gag man and

writer." From Sennett's I went to the Harold Lloyd Corporation as a gag man and writer. I was with Harold Lloyd for possibly a year and a half, when I returned to Buster Keaton. From Buster Keaton I went with Monty Banks Productions; from there to the Hal Roach Studio, as director and writer. From the Hal Roach Studio I went to Metro-Goldwyn-Mayer as a writer. From there I went to the Harold Lloyd Corporation as a writer. I remained with the Lloyd Corporation as a writer and later director, with certain intervals at other studios, until some time in 1933, I believe. From there I went to Mack Sennett Pictures, then to Columbia, and worked alternately between Columbia and other studios, including the [474] Harold Lloyd Company, until 1938. In 1938, I worked with Columbia steadily until coming to Universal in the early part of 1943."

The Court: That is from the deposition of the defendant Bruckman?

Mr. Abeles: Yes, sir, defendant Bruckman.

Mr. Fendler: I have a question and answer on cross examination in that deposition I would like to read. It is on page 69, line 17.

Mr. Lewinson: There was no cross examination on the deposition. You took the deposition, Mr. Fendler.

Mr. Fendler: This is being read because of the deposition of Mr. Yarbrough, which has just been read into evidence.

Mr. Abeles: You can read any part of it you like.

Mr. Fendler: Very well:

"Q. What was the source of your material?

"A. I told Mr. Yarbrough at the time that I had done this in a Columbia picture a couple of years ago, at which time it had been suggested by and patterned after a se-

quence we had done in the Harold Lloyd motion picture Movie Crazy, as I remember it."

He testified to that on his examination here in court.

Mr. Abeles: Yes.

Mr. Fendler: I have one further witness, if your Honor please. [475]

The Court: Have you any further witnesses?

Mr. Abeles: No, we haven't. There is only one thing unless we can stipulate that shortly after receipt of the notice of this communication of March 20 that I offered in evidence—I forget the number—

The Clerk: Exhibit G.

Mr. Abeles: We sent out the—the defendant Universal Pictures Company sent out instructions to all their exchanges to stop the exhibition of the picture until this matter had been determined.

Mr. Fendler: I will stipulate such instructions were given. I will not stipulate the instructions were complied with.

Mr. Abeles: To the best of our knowledge they were complied with.

Mr. Fendler: You do not contend the plaintiff is not entitled to an injunction, do you?

Mr. Abeles: No.

Mr. Fendler: Very well, we will so stipulate. Shall I call my witness?

The Court: Yes.

Mr. Fendler: Mr. Botsford, will you take the stand.
[476]

A. M. BOTSFORD,

called as a witness by and on behalf of the plaintiff in rebuttal, being first duly sworn, was examined and testified as follows:

The Clerk: State your full name, please.

The Witness: A. M. Botsford.

Direct Examination.

By Mr. Fendler:

Q. Have you at any time been associated or affiliated with the motion picture industry, Mr. Botsford?

A. Yes.

Q. For how many years?

A. Approximately 25 years—over 25 years.

Q. Now, will you state to the court whether or not you have ever had motion picture contact with the distribution and exhibition of motion pictures?

A. Yes, sir. I entered the motion picture business as a publicity man for Paramount Pictures. Publicity then was—from there to distribution and then advertising manager for Paramount Pictures, which was under distribution. From there I became advertising manager for Paramount-Publix Theatres.

Q. That is a chain of theatres owned by Paramount-Publix, Inc.?

A. Yes, sir.

Q. They are exhibitors? [477]

A. Yes.

Q. And that chain consisted of how many theatres?

A. Approximately 11 or 12 hundred theatres.

Q. Eleven or 12 hundred?

A. Yes, sir.

Q. All right. Will you go on, please?

A. From that point I was—I became head of the editorial board at the Paramount Studio in Hollywood

(Testimony of A. M. Botsford)

and went into production, distribution, exhibition and then production.

Q. And what was your connection with the production end of the business at Paramount?

A. First I was head of the editorial board for a matter of a couple or two years, and then I became executive assistant to the head of the studio.

Q. And for how long a period were you executive assistant to the head of Paramount Studios or successive heads?

A. Successive heads? Yes, approximately five years.

Q. For approximately five years? A. Yes, sir.

Q. That was during the 30's?

A. That was during the 30's, yes.

Mr. Lewinson: May I interrupt and suggest we get some terminal dates.

Mr. Fendler: I will be glad to. [478]

Q. By Mr. Fendler: Will you state the approximate period of time you were associated with the distribution of Paramount Pictures in New York?

A. 1917 until I became advertising head of Publix Theatres, which was in 1926 and '27.

Q. How long did you remain with Paramount-Publix Theatres?

A. Until 1929. This is to the best of my recollection.

Q. Then about 1929 did you come out to the West Coast?

A. I first operated for the Paramount editorial board in New York for a matter of about a year and then was transferred to the coast in 1931.

(Testimony of A. M. Botsford)

Q. Now, how long did you remain on the editorial board out here in Los Angeles?

A. To the best of my recollection it was from 1931 until possibly 1939.

Q. And then for the next five years you say you were executive assistant to the head of Paramount?

A. From 1933 until 1936 I was executive assistant to the head of the Paramount Studios.

Q. That was for a succession of heads, is that correct?

A. That is correct.

Q. Then in 1936 what did you do? [479]

A. In 1936 I was made a producer of pictures.

Q. And approximately how many pictures did you then produce at Paramount?

A. During my regime there I produced approximately 15 or 16 pictures. I have forgotten the exact number.

Q. Then when did you leave Paramount?

A. I left Paramount in 1941.

Q. Now, during the entire period that Harold Lloyd pictures were being distributed by Paramount, that is, from 1929 until 1941 I think you testified, you were connected with Paramount, is that correct?

A. Yes, that is correct.

Q. And then in 1941 what did you next do?

A. In 1941 I became the advertising head of 20th Century-Fox Films with headquarters in New York.

Q. And were you then again in the distribution and exploitation end of the game? A. Yes, sir.

Q. And then after terminating your connection with 20th Century-Fox what did you next do?

A. I became the managing director of the A. & S. Lyons Agency.

(Testimony of A. M. Botsford)

Q. As managing director of the Lyons Agency—are there various departments of that agency?

A. Yes, sir. They have to do with the sale of talent, [480] stories, radio, to the various buyers.

Q. Do they also have anything to do with the sale or resale of motion picture rights?

A. We in that agency try to interest studios in the possible sale of motion picture rights but I don't remember of any sales that we made.

Q. But at least—being actually made—but at least you were familiar with the general market conditions during the years 1942 and '43 and up to date, is that correct? A. Definitely.

Q. Now, Mr. Botsford, have you at my request in the last two days examined the—inspected the motion pictures *Movie Crazy*, *So's Your Uncle* and the Columbia short *Local Boy Makes Good*? A. Yes.

Mr. Fendler: If your Honor please, I would like to turn the witness over to your Honor for any questions that your Honor might wish to ask.

The Court: I am interested in knowing what he knows about sales for re-issue or remake purposes.

Q. By Mr. Fendler: Very well. Now, Mr. Botsford, I will ask some more qualifying questions. During the course of your regime at Paramount, between 1930 and 1941, did Paramount remake any motion pictures? [481] A. Yes.

Q. Comedies or otherwise? A. Both.

Q. Will you state to the court—question withdrawn. In considering the—question withdrawn.

(Testimony of A. M. Botsford)

Will you name some of the comedies that were remade at Paramount during the period that you were executive assistant to the head of the studio?

Mr. Abeles: I object as not the proper form of proof. We concede it has been testified to that many types of pictures have been made, remade, based upon novels and books but that is no criterion of what this picture would be worth.

Mr. Fendler: I will qualify him.

The Court: I think the objection is good.

What do you know about the custom in the industry with reference to the disposition of films that have run their course and have been put away in storage, as to whether or not they are ever brought out and used again?

The Witness: Yes, I think they are. Of course the negatives are put in the vaults and from time to time some producers or the studio heads get the idea that that picture, in looking over the catalog of pictures they made, would make a good picture to remake. In fact, they are struggling for [482] stories all the time and one of the things they actually hire people to do is go over their catalog of pictures and see if there isn't some picture that was formerly made that could be made again.

The Court: And do you know of any sales of pictures for that picture, not naming the picture or the price?

The Witness: That experience is confined to Paramount. I myself as head of the editorial board engaged people to go over the catalog looking for stories that have been made and, of course, there was no sale because Paramount made it. It owned the story. We did have a long list of pictures which we were willing to sell to other producers.

(Testimony of A. M. Botsford)

The Court: Did you have lists of pictures that other producers were willing to sell?

The Witness: That we made ourselves?

The Court: No, that other producers would want. Do other producers have lists of pictures for sale?

The Witness: Yes, sir.

The Court: Is that more or less a common practice?

The Witness: That is a common practice, yes.

The Court: What do you know about re-issued pictures after they have been stored away for a number of years?

The Witness: The same thing applies. The distribution department would begin to speculate what pictures had been formerly made that would make re-issue at that particu- [483] lar time, or whatever particular time it was. Suppose they decided The Virginian would be a good picture to re-issue or they would decide the Sign of the Cross would be good for re-issue, the market was ripe for that type of thing.

The Court: How long would you have to hold a picture before you could re-issue it?

The Witness: That would be difficult to say. I think five, six or seven years. I don't think there is any particular time—any arbitrary fixture of time.

The Court: Would the re-issuance of it be governed any by the cost of the original picture and its financial success?

The Witness: That would enter into it, I would think, yes.

The Court: Would you take that into consideration?

The Witness: Yes.

(Testimony of A. M. Botsford)

The Court: In other words, if a picture on its original issue had not been a financial success you would not re-issue it?

The Witness: That is correct.

The Court: You would not be interested in re-issuing it?

The Witness: That is correct.

The Court: Do you have any knowledge of any picture, without naming them or the amount of the sale of those pictures, do you have any knowledge of such sales to third parties? [484]

The Witness: I know of the sale of, yes, one in particular. There are probably others. For instance, Paramount sold some to 20th Century Fox—Blood and Sand. I am not sure of the figures but I think it was something around \$100,000.

Mr. Abeles: I move to strike that out, if the court please.

The Court: That portion of the answer will be stricken. Then the purpose of retaining these old films is three-fold: One, possible re-issue, possible re-make and possible sale to a third party?

The Witness: Correct.

The Court: You may proceed.

Q. By Mr. Fendler: Now, after having witnessed the picture Movie Crazy starring Harold Lloyd, do you have an opinion as to the reasonable market value of the re-issue rights of that motion picture as of December 1, 1943, prior to the release or distribution of the Universal picture. Just answer yes or no.

A. Yes, I have.

(Testimony of A. M. Botsford)

Q. Will you state what, in your opinion, was the fair market value of the re-issue rights of that motion picture as of that date?

Mr. Abeles: I object on the ground the witness is not properly qualified for that answer. It is not the proper form [485] of proof to establish the value of the re-issue rights of that picture.

Mr. Fendler: We submit it, your Honor.

The Court: Just wherein do you claim he is not properly qualified?

Mr. Abeles: He has not dealt in re-issue or re-make rights. He named a couple of famous stories—Sign of the Cross, Blood and Sand. Of course we know they are famous stories, but he has not shown he had anything to do with comedies of this nature or pictures of this nature. How can he get up there and coldly say what he thinks the re-issue rights are worth?

The Court: Doesn't that go to the weight of the testimony?

Mr. Abeles: I had the man that actually sold the Harold Lloyd picture and I tell your Honor now he bought it for \$3,500.00 and he lost money on it. He could not get an exhibitor to take it and they took it back at \$1,000 loss. I wanted to put that in. That is the best positive evidence of this kind. This certainly has no bearing at all. He is not qualified, I mean. Here is a picture, at least a Lloyd picture, that I couldn't get in.

The Court: The trouble is, counsel, when you start talking about different pictures it is like talking about the value of this building as compared with the value of the

(Testimony of A. M. Botsford)

City [486] Hall across the street. It depends on the picture.

Mr. Abeles: That is right.

The Court: Here is a man with long years of experience in the industry. Doesn't your objection go rather to the weight to be given to his testimony than anything else?

Mr. Abeles: I say it goes both ways. Of course my point is, as your Honor said, it is not a—in other words, a similar article of property is not the proper basis of establishing value.

The Court: I think if the two pictures were comparable that would be one thing, but when you simply name two different pictures that does not mean they are comparable.

Mr. Abeles: That is right, sir. It depends upon many factors the same as a play. I can offer a play on one side of the street and maybe have a big failure and your Honor would open it on the other side and have a howling success.

The Court: I know if I opened one on either side what would happen.

Mr. Abeles: That has been proven over and over again. I know a picture called Wilson that 20th Century Fox spent three and a half million dollars on and only got back \$2,000,000, but the public thinks they made a lot of money on it. That has happened a lot of times. That is no criterion.

Mr. Fendler: We submit he is qualified.

The Court: I think the witness is qualified. You may [487] answer the question.

(Testimony of A. M. Botsford)

Q. By Mr. Fendler: What in your opinion was the value of the re-issue rights as of December, 1943, of *Movie Crazy*?

A. Well, I will have to qualify that by saying that my knowledge of that comes from the fact that I know that the distribution department would say to us unless we can make \$100,000 there is no use of re-issuing it. Now, in the case of *Movie Crazy* I would say somewhere around that figure.

Q. Do you have an opinion as to the value of the re-make rights of *Movie Crazy* as of that date?

A. Yes.

Q. What in your opinion was the value or what would have been the reasonable value of the re-make rights of *Movie Crazy* as of that date?

Mr. Abeles: We respectfully make the same objection.

The Court: Same ruling.

The Witness: I would say from 125 to 150 thousand dollars. I can qualify that if you like.

Q. By Mr. Fendler: Make any statement you want.

A. It is based on the fact—it depends on who wants it and for what purpose they want it. In the case of Paramount, with which I am of course most familiar, there is a boy named Eddie Bracken who is a young Harold Lloyd. They might very well pay \$150,000 for a picture that Harold Lloyd [488] had once made for an Eddie Bracken starring vehicle. They would do the same thing for Danny Kaye. The value depends on who is going to buy the picture and for what purpose they want it.

(Testimony of A. M. Botsford)

Mr. Abeles: If your Honor please, I move to strike out the testimony on the ground it has been established that in the case of Danny Kaye he played in a very famous stage play. In this case Movie Crazy—there is no comparison at all. The witness is merely supposing that if Paramount might decide to make a picture with Bracken that this would be a good picture for him.

The Court: I think his answer simply qualifies his explanation. I should think you would want that in.

Mr. Abeles: I want the whole thing out.

The Witness: I know one thing that is not based on a famous play that was re-made by Paramount and was very successful, if you want me to go into that.

Q. By Mr. Fendler: Yes.

A. For instance, a picture that is running today. It just opened. It is called Hold That Blonde with Eddie Bracken, the same fellow I am talking about. That was a picture made by Raymond Griffith, which was a comedy. It was made for Paramount years ago. The story was taken from the Griffith picture and re-made for Eddie Bracken. It just opened last night. It is called Hold That Blonde. [489]

Q. By Mr. Fendler: Now, do you have an opinion as to the re-issue rights of the Harold Lloyd picture Movie Crazy as of the present date, taking into consideration the release and distribution of the motion picture So's Your Uncle by Universal during the year 1944 and the first part of 1945?

A. I wouldn't think it would be very good for re-issue or re-make now.

The Court: Do you think it would after a period of time?

(Testimony of A. M. Botsford)

The Witness: It is possible. People forget what they saw in other pictures.

The Court: In another four or five years it might be good?

The Witness: Possibly. That is just a matter of opinion. I don't know.

The Court: You are in that business and I am asking you for your opinion.

The Witness: I would say that in a certain length of time that the re-issue and re-make value might be worth something. Certainly not what it would be worth if it were not for those pictures.

The Court: Did you see the Columbia short?

The Witness: Yes, sir.

The Court: Don't you think that depreciated the value of the Harold Lloyd picture?

The Witness: To some slight extent. Depending on how [490] many people saw the Columbia short and what type of people they were—what kind of theatres it played in and how much audience reaction there was to the picture.

The Court: Any time that sequence is displayed in any great number of theatres it has a tendency to weaken and destroy the value of that sequence for re-issue or re-make?

The Witness: To a certain extent. If it was played in the theatres that are playing along the bowery and in the small grind houses, the type of audience that goes into those houses doesn't matter much.

The Court: Assuming it is played as a short in the same type of theatres?

(Testimony of A. M. Botsford)

The Witness: If it were actually played in the same type of theatres and was seen by the people that saw the feature it would have some effect, yes.

The Court: Don't you think it would have a substantial effect?

The Witness: No, I don't. In other words, I only base it on how you feel about purchasing—if you are going to purchase *Movie Crazy* and somebody else tells you there has been a Columbia short made which uses that sequence, you might have some—you might mark it down a little bit, but not very much. But then somebody else tells you, "Well, there is a feature being made which has the sequence in it." Then the market is entirely off. In other words, I think there is some [491] damage but nothing like the feature picture damage. That is just my personal opinion.

The Court: That is your opinion based upon your experience in the industry?

The Witness: Correct.

Q. By Mr. Fendler: Are shorts and features in competition ordinarily, Mr. Botsford?

A. No, not at all.

The Court: You could not run a feature and a short with the same sequence in them simultaneously?

The Witness: No, I wouldn't think so.

The Court: Or even reasonably close together?

The Witness: I think you would be crazy if you did.

The Court: I mean it would not be good business?

The Witness: No, it is not good business.

Q. By Mr. Fendler: But in the sale of motion pictures to exhibitors or in the exhibition of motion pictures,

(Testimony of A. M. Botsford)

for example in Paramount-Publix Theatres is a short generally considered comparable to a feature?

A. No, sir.

Mr. Abeles: I object to that, if the court please. I think it is wholly immaterial.

The Court: I have made myself clear that I feel a showing of that sequence cannot help but cause damage to the original story. To what extent it is damaged is a matter of [492] judgment and unfortunately somebody who does not know anything about the industry has to make that decision.

Q. By Mr. Fendler: Are you able, Mr. Botsford, to compare the Harold Lloyd talking motion picture of Movie Crazy and Milky Way with respect to story value, cost, success and profits?

Mr. Abeles: I object to that, if the court please.

The Court: Objection sustained.

Mr. Fendler: May I make an offer of proof?

The Court: You may submit your offer in writing at a later time. Counsel, I am doing my best to protect this record so in the event I render a judgment in your favor it will hold water, but you seem to not want me to do that.

Mr. Fendler: I do want you to render a judgment in my favor, your Honor.

The Court: But you don't want me to render a good judgment evidently, in view of the nature and scope of your questions.

Mr. Fendler: Nothing further.

(Testimony of A. M. Botsford)

Cross-Examination.

By Mr. Abeles:

Q. You said, as I recall, that Paramount in your opinion would not buy the re-issue rights to the picture *Movie Crazy* unless they thought they could make \$100,000, is that correct? [493]

A. I did not say *Movie Crazy*. I said any re-issue. I said if the question came up as to what picture we would re-issue the distribution department would say, "Unless we can make \$100,000 on it there is no use of re-issuing it."

Q. So it depends on whether or not they could make \$100,000 on the picture?

A. That is an arbitrary figure. They would say they want to make so much money.

Q. You mean make a \$100,000 profit?

A. Yes.

Q. When you said whether they bought the re-make rights at \$125,000 or \$150,000 you meant profits, didn't you?

A. You must have misunderstood me, or I did not make it plain. I would estimate the re-make rights of *Movie Crazy* depending on who wanted it and for what purpose. Taking those things into consideration it would be a long about \$125,000 or \$150,000 to buy the rights.

Q. It hasn't any outstanding story?

A. Not outstanding, but a good story.

Q. It is a secondary story, a mediocre story? You don't put that in the same class with *Blood and Sand*?

A. I put it in the same type as *Hold that Blonde*.

The Court: Let us not argue.

Mr. Abeles: Just one question and then I am through.

(Testimony of A. M. Botsford)

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Mr. Fendler: I do want you to render a judgment in my favor, your Honor.

The Court: But you don't want me to render a good judgment evidently, in view of the nature and scope of your questions.

Mr. Fendler: Nothing further.

(Testimony of A. M. Botsford)

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By Mr. Abeles:

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A. Not outstanding, but a good story.

Q. It is a secondary story, a mediocre story? You don't put that in the same class with *Blood and Sand*?

A. I put it in the same type as *Hold that Blonde*.

The Court: Let us not argue.

Mr. Abeles: Just one question and then I am through.

(Testimony of A. M. Botsford)

Q. Did you say they bought the story of Hold That [494] Blonde?

A. No. Re-made the picture from an old story that they owned.

Q. From a story?

A. From a picture they previously made.

Q. You said before they re-made the story, didn't you?

A. They re-made Hold That Blonde from a picture they had formerly made. Naturally there was a story in connection with it.

Q. Was the picture ever released?

A. Which picture? The first one?

Q. Yes, was it? A. The first one, yes.

Q. And the second one? A. Yes.

Q. When did it open? A. Opened last night.

Q. Who was it originally written for?

A. Raymond Griffith.

Q. He is not the same type of comedian as Harold Lloyd?

A. At the time he was making comedies for Paramount he was a good boxoffice bet.

Q. But he wasn't the same kind of comedian?

A. Same type—same caliber but not the same box-office [495] attraction.

Q. He worked on the same type of pictures as Harold Lloyd? A. To a large extent.

Q. Was that story written for that picture? Who wrote it?

A. I think it was written by Paul Armstrong.

(Testimony of A. M. Botsford)

Q. And who was it written for?

A. Written for Raymond Griffith as I remember.

It was a long time ago.

Q. You are not sure of that?

A. Well, I know it was a picture that was devised for Raymond Griffith.

Q. You are sure it was not a play before that?

A. No, I am not sure but I don't think it was.

Q. That is all I wanted to know.

A. Certainly was not a prominent play anyway, or I would have remembered it.

Mr. Abeles: That is all.

Redirect Examination.

By Mr. Fendler:

Q. Doesn't the fact that a motion picture is based upon a prominent play or novel necessarily indicate a box-office value or profit which is not attainable by original stories? [496]

A. No.

Q. Have original stories in many instances been much more profitable when made as motion pictures?

A. No.

Q. Motion pictures based on plays and stories?

A. Yes.

Q. In some instances—

The Court: Do you think that is proper examination, counsel?

Mr. Fendler: Very well, your Honor.

Mr. Abeles: Just one question.

(Testimony of A. M. Botsford)

Recross-Examination.

By Mr. Abeles:

Q. Do you know one single picture of the type of Movie Crazy with a secondary story, the situation comedy not based on a play or novel that has ever been re-made?

A. Well, Hold That Blonde.

Q. That is the only one you can think of?

A. I could probably give you more if I had a little time to think of them.

Q. But you can't offhand, can you? A. No.

Q. That is all I want.

Mr. Fendler: That is all. Does your Honor have any further questions? [497]

The Court: No questions.

Mr. Fendler: Now, we have nothing further except a stipulation. Have we arrived at the overhead figure, Mr. Knupp?

Mr. Knupp: Well, there is something involved in that question of profits, if the court please, that I don't think is before the court. I don't know how it can be gotten before the court without some reference—that is the question of proportion of profits, if the profits are to enter into the determination of any judgment that is entered in this action. If the question of profits is to be determined or to be considered in arriving at any judgment in this action, the question of the proportion of the profits which are justly attributable to the sequence of the two pictures is something it seems to me would have to be determined by evidence before the court. There is no evidence of that before the court now. The court

heretofore indicated the matter might possibly go to a Master.

The Court: I said the matter of profits but not the apportionment.

Of course I realize that each case has to stand on its own bottom but it has grown into more or less a practice that profits are generally apportioned as in the Sheldon case. The courts to a great extent have followed that procedure.

Mr. Knupp: There are two cases that I know of that the [498] court may have reference to in which I think that was true.

If we could assume or it were stipulated that that were so then we would not think it necessary that any evidence should be offered on the apportionment of profits, but unless we have the assurance of counsel that the question will not be raised sometime or other that there was no evidence upon which the court could properly apportion the profits.

The Court: The court having seen both pictures and heard the evidence, I think it is within the sound discretion of the court, according to the decisions I have read, always bearing in mind that if there is anybody to be hurt it is the infringer.

Mr. Knupp: I think, if the court please, that provision for apportioning profits grew out of the similar provision in the patent law—that expert testimony on that matter would be considered.

In the Sheldon case the plaintiffs offered no evidence at all with respect to what proportion of the profits were justly attributable to the infringing material. The evidence was all offered on behalf of the defendants and the court arrived in that case at its determination, ap-

parently not based on what the experts testified to, but placed the figure high enough where the court said in any event it should not exceed that figure. I understand in the case before Judge O'Connor tried in this District there was expert testimony [499] before the court as to the apportionment of the profits. The only thing that I fear is that there is some question as to whether the court can, without any evidence, arrive at a figure as to what is the just division of the profits as between the infringing material.

The Court: You gentlemen are privileged to introduce all the expert testimony you desire, but in fixing the liability I am going to follow the Sheldon case.

Mr. Knupp: If the court announces that as its determination, I assume then, of course, evidence would be of no value in any event.

Mr. Fendler: We are prepared to offer evidence, if your Honor please, that no allocation or profits can justly be made in this case. We are prepared to offer expert evidence on that at this time.

I would like to say to your Honor with respect to both the Sheldon case and the Stonesifer case that where no damages are pleaded or proven in a case, where the only question is one of profits, and that was the situation in both the Stonesifer and the Sheldon cases, the rule which was adopted there is not applicable to the instant case in any respect and we take the position—

The Court: You don't claim you are entitled to both profits and damages, do you?

Mr. Fendler: Under the copyright act we do claim that [500] we are entitled to both damages and profits, but we do not believe in view of the fact that the Copyright Act requires the profits to be ascribed to that por-

tion of the infringing—to the infringement that any apportionment of profits is possible.

We wish to offer evidence on that score. In other words, this is the sort of a case, if your Honor please—

The Court: Counsel, I recognize the reasoning in the Sheldon case. The only question in my mind is whether 20 per cent wasn't too large an apportionment. That is one of the questions that has been in my mind. I figured that in view of all the cases it has been generally recognized that there is not only this sequence that entered into the value of this picture, but according to the statement made here and the offer of stipulation it was an unsuccessful picture. It only made \$20,000 net profits. It wasn't worth producing so far as the studio was concerned; and this sequence was only a part of that picture. There were many other things that went into the making up of that picture.

I have no hesitancy in saying that I had hoped you gentlemen could agree that that would be a proper apportionment. If you cannot I will listen to your evidence.

Mr. Knupp: Just a minute, if the court please. Before we go into that question, the record, I think, in the previous hearing indicates that your Honor said that if the matter of [501] profits was to be gone into it was to be submitted—

The Court: That did not have to do with apportionment, counsel. I never intended to have the question of apportionment referred to a Master. The only thing I was concerned with was as to the details as to how the profits were arrived at—that is, the gross receipts and the proper deductions from them and from those figures determine what the net profits were from the picture.

Mr. Knupp: I think the court will find in all of these cases in which the matter has been submitted to a Master, it has been submitted both for the purpose of determining profits and determining the proper apportionment.

The Court: Well, I take a little different attitude so far as a Master is concerned. I assume my own responsibilities and arrive at my own conclusions in that respect. The only thing that a Master would do would be that which an expert accountant would do.

Mr. Knupp: Well, if the court please, we did not know in advance what your Honor's attitude on that subject might be. We had to assume the court would follow the practice which seems to have prevailed generally with respect to the matter.

The Court: If there is any question about it I will listen to any testimony you care to offer. If Mr. Fendler contends he is entitled to more than 20 per cent he can put [502] on his evidence to that effect.

Mr. Fendler: No, if your Honor please. The evidence I propose to offer is that it is impossible to apportion profits to the infringement.

The Court: Of course even in the Sheldon case, when you come right down to it, it was found impossible to apportion the profits, but the court in its judgment made an apportionment. You have all the elements in this case that you have in any moving picture. But before going any farther, have you gentlemen arrived at a stipulation?

Mr. Fendler: We will stipulate that the profits were the figures read into the record by counsel as of the

date given, namely, \$20,517.28. And we request the further stipulation that the item of negative cost of \$104,693.42 includes an overhead charge which was not an out-of-pocket expense.

Mr. Knupp: We so stipulate to that, if the court please.

Mr. Abeles: We do not stipulate it was not an out-of-pocket expense. In the Sheldon case they said you could charge overhead.

Mr. Fendler: We are not trying the Sheldon case, if your Honor please.

The Court: Gentlemen, you have given each other statements. Why can't you stipulate as to the correctness of the statement and introduce it in evidence? [503]

Mr. Knupp: That is what we are willing to do, if the court please.

Mr. Fendler: We are willing to do that, if your Honor please, subject to the additional stipulation as to 19 per cent of the negative cost of \$104,693.42 being included in it.

The Court: As overhead?

Mr. Fendler: Yes.

Mr. Knupp: We will stipulate to the statement subject to the addition counsel has made, if the court please.

Mr. Fendler: That is satisfactory.

The Court: Then let the statement be introduced in evidence so I will have it before me.

Mr. Abeles: I have the original, if your Honor please, and I will offer it in evidence. I have already read it into the record before.

The Clerk: Defendants' Exhibit I.

(The document referred to was marked as Defendants' Exhibit I, and was received in evidence.)

[DEFENDANTS' EXHIBIT I]

SO'S YOUR UNCLE

Gross proceeds:

U. S. (to 7/14/45)	\$142,283.39
Canada (to 6/23/45)	6,506.74
Great Britain (to 5/26/45)	37,998.34
Other Foreign Countries (various)	16,481.62
Outright sales—domestic (to 7/14/45)	4,539.15
“ “ —foreign (to 5/26/45)	1,003.68
	<hr/>
	\$208,812.92
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Costs and expenses:

Negative	\$104,693.42
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Prints:

Domestic	12,494.26
Canada	927.30
Great Britain	3,502.03
Foreign (including import duty)	7,257.49
Advertising, censorship, etc.	5,000.00
	<hr/>
	\$133,874.50
	<hr/>
	\$ 74,938.42
	<hr/>

(Defendants' Exhibit I)

Distribution fees:

25% of U. S. Gross proceeds	\$ 35,570.85
30% of Canada, G. B. & foreign	18,296.01
10% of outright sales	554.28
	<hr/>
	\$ 54,421.14
	<hr/>
<u>Profit</u>	\$ 20,517.28

No. 4361-BH-Civ. Harold Lloyd Corp. vs. Universal, et al. Defts. Exhibit I. Filed Nov. 16, 1945. Edmund L. Smith, Clerk, by MEW, Deputy Clerk.

The Court: Is it all right to call it a defendants' exhibit?

Mr. Abeles: It is all right with me.

Mr. Fendler: Now, may I offer my evidence as to the impossibility of apportionment, if your Honor please?

The Court: Yes. [504]

Mr. Fendler: Mr. Botsford.

A. M. BOTSFORD,

called as a witness by and on behalf of the plaintiff, having been previously duly sworn, was recalled and testified further as follows:

Direct Examination.

By Mr. Fendler:

Q. Mr. Botsford, in your opinion is it possible to apportion profits received from the motion picture So's

(Testimony of A. M. Botsford)

Your Uncle to the particular sequence which has been heretofore designated as the "magician's coat" sequence contained therein?

Mr. Abeles: I object on the ground it is irrelevant, incompetent and immaterial and not the proper proof under the authorities and contrary to the authorities.

The Court: Well, counsel, I have already stated what I am going to do. Why not let him proceed?

Q. By Mr. Fendler: What is your answer, Mr. Botsford? A. No.

Q. In your opinion it is not possible?

A. It is not possible—I don't think so.

Mr. Fendler: That is all.

The Court: That is true of any picture, is it not?

The Witness: That you cannot apportion what part of the picture makes a profit.

The Court: That is what I have in mind. [505]

The Witness: I would not think so. I think you would be a genius if you could.

Mr. Fendler: That is all.

The Court: Do you have any further evidence?

Mr. Fendler: I think that is all.

Mr. Abeles: That is all.

The Court: Gentlemen, I want to see the Columbia short.

Mr. Abeles: What time would be convenient?

(Discussion off the record.)

Mr. Lewinson: Does your Honor want to fix a time for oral argument?

The Court: Gentlemen, there is a serious question in my mind whether I want oral argument.

To be perfectly frank with you I feel there are certain features of this case where counsel can be of more help to me than they have been so far, and that is whether or not the same rules do not apply in Copyright cases that apply in Patent cases.

I have not had time to complete my own research on that question, but it is quite evident that in patent cases, that is, Section 70 of the Code, and Section 25 under which this suit is brought, the language is very similar. The Sheldon case brings out the fact that before the committee that drew the Act that it was modeled after, they had the feeling that probably the same rules would be applied by the courts. [506]

Now, if that is true, as I understand the law and I am making this statement so counsel can correct me if I am wrong—and I want to state as I stated before that I have been so showered with briefs at a late date that I do not know all the points you have covered. You may have covered this. But it is my understanding of the law that if the profits are not sufficient to compensate the plaintiff for his damages, the court can add such an amount so as to compensate him. In other words, if the plaintiff in this case is entitled to recover that recovery is not limited to the profits. That is, if he has been damaged more than his proportion of the profits would amount to, the court can add to that amount which will compensate the plaintiff for the damages suffered by him. He does not have to suffer a loss because of any act on the part of the defendants.

I re-read the Sheldon case last evening and I have been floundering on this question of damages, but that was

the conclusion I came to in the short time I had to study the subject matter.

Contrary to your argument in your brief, I believe there has been an infringement and it is rather difficult for me to understand how counsel can argue to the contrary.

Mr. Lewinson: Has your Honor read my brief or the brief we filed several days ago?

The Court: Yes, I have read that and we have also had a [507] conference in chambers on this matter. But as far as I am concerned, after seeing the picture and listening to the evidence in the case, there is no question in my mind as to there having been an invasion of the Harold Lloyd picture. The only problem confronting me is the question of damages.

I realize that counsel argues that is a speculative question. I think first the court must determine whether there was in fact any damages.

Mr. Lewinson: That is right.

The Court: But because the amount is difficult of determination that does not mean that the plaintiff must be penalized. It is the same thing as a personal injury case. A man may be seriously injured but nobody knows exactly how much he is entitled to receive for his injuries. That is left as a general rule to the good judgment of a jury. They reach out and pick some figure out of the sky and that is the damages and that is all there is to it.

Now, in this case I feel Harold Lloyd has been damaged. However, I am not impressed with the high figures furnished to me by the plaintiff. I have not reached any conclusion on that and I do not wish to do so until I have received your briefs on the law and any facts that you wish to emphasize.

Mr. Knupp has tried a number of cases before me and I think he knows that I prefer briefs and I think he has found out by this time that I generally read them. [508]

Mr. Lewinson: Your Honor, I can see the advantage of having a matter of this kind largely covered by briefs, but because of your Honor's observation a moment ago; that there might be some value in having a short oral argument after your Honor has covered the briefs.

Now, as to the question of liability. I have, apparently, made myself, or have not succeeded in making myself understood at all in my briefs.

The Court: It may not be your fault. It may be the court's fault. I want to say, however, that Mr. Knupp's brief reached me first and I went through it and have gone through it a couple of times. I have not made a careful study of his citations because I felt they were covered in the arguments during our last hearing.

Mr. Lewinson: I do not believe that is the fact, your Honor.

The Court: I felt they were more or less along the same line of argument that we had before and in the cases cited then I did not find the answer I wanted.

Mr. Lewinson: My thought was this: If I have your Honor's difficulty in mind I think a short oral argument would tend to clarify it.

Now, I might say that I was not able to get around to the research that was required on the matter until after the adjournment last time. The original printed brief we filed [509] was only what might be called a stop-gap document. In other words, we had to get it up very quickly and we did not have a change to break the thing down.

Since then I have gone into the rules of the Copyright Office, which I think is very helpful on the matter. I think it is supported by law—

The Court: But, you have cited so many texts I would have to go to the Congressional library to get them.

Mr. Lewinson: They are all in the Public Library. That is where I got them.

At the previous hearing I took the view that in your Honor's mind it was not a question of the magician sequence but it was the question of a comedy sequence. In other words, I think on analysis it breaks down into a matter of burlesque and I think that the authorities are plain—that the element of dramatic composition, which is covered by copyright, does not extend to burlesque or forms of entertainment other than the drama.

The Court: I remember your discussing that point.

Mr. Lewinson: In the other brief we did not press it from that standpoint at all.

The Court: Here is the way I look at the situation. If Harold Lloyd is not protected in this sequence then none of you people who are engaged in the industry have any protection against the lifting of sequences from your pictures. It seems [510] to me that it is as important to you as it is to Harold Lloyd to have your copyrights fully protected and the law strengthened rather than weakened.

Of course I know you are only trying this present lawsuit, but in order that you may fully understand my attitude at this time and so that there will be no occasion for argument, I am going to hold there is an infringement. Now, if the Circuit Court wants to weaken your Copyright law, that is its privilege. I am going to try to strengthen it.

Mr. Lewinson: Your Honor, I do not like to press the matter unduly, but I think as counsel I have a duty to suggest to the court that perhaps after your Honor has thoroughly considered the matter as presented in the 58-page brief filed the other day, and particularly if you listen to brief oral arguments, you may reach a different conclusion because I think your Honor will find that the matter is similar to what the United States Supreme Court has held in the patent laws.

Now, up until the last five or six years the Supreme Court held that the patent laws extended to tying agreements. Now, they have reversed all those cases and held to the contrary.

I think a full consideration of the cases indicate that the Copyright laws do not extend to burlesque, no matter whose routine they are. Where dramatic compositions are concerned they hold differently. [511]

I think your Honor will find it has uniformly been held that a sequence of this kind does not rise to the dignity of a dramatic performance; that it is merely burlesque or slapstick and not the subject matter of copyright. That is the law in this country and the law in England.

Now, I don't know that I will be able to convince your Honor of that.

The Court: The Circuit Court might be able to convince me of it, but I doubt whether you can. I am going to let the Circuit Court settle that issue because I do not believe that Universal pictures, for instance, could put out a comedy with a sequence that is outstanding and your competitor the next week, when he recognized it was going over well, can use the same thing in his picture.

Mr. Lewinson: But they have done it in vaudeville and in circus acrobatics and burlesque from the beginning of time.

As I say, I might not be able to convince your Honor, but if I have an opportunity I think I can. Your Honor cannot tell about that unless I have a fair opportunity to present that matter by oral argument.

As your Honor has already intimated, it is a matter of great importance generally, and far more important than it is in this particular picture because the testimony shows that gag men use the same gags, and history shows, which is the subject matter of judicial notice, that has always been done, [512] and I think with all deference and all respect and at the risk of making myself obnoxious, that I ought to press upon your Honor that I have an opportunity to present that matter fully by oral argument.

The Court: I shall not deny you that opportunity, but I want to say now if there is any legislating to be done it is going to be done by some court other than this one.

Mr. Lewinson: I think the view that your Honor has tentatively taken would involve judicial legislation and that the view I am expressing is the only view that is consistent with the cases as they now exist and that is the reason I would like an opportunity to present it to your Honor.

The Court: I do not approve of judicial legislation and avoid it as much as possible.

Mr. Lewinson: And I want to guard your Honor against indulging in judicial legislation.

The Court: Well, I have been able to take care of myself pretty well, Mr. Lewinson.

Mr. Lewinson: Your Honor probably can take care of yourself better than anyone else, but on the other hand, it has heretofore been thought that counsel can sometimes aid the court in taking care of itself and that is the province of counsel. But, your Honor, I am not trying to be funny. I am quite serious.

The Court: I appreciate that and I did not intend to be [513] facetious either.

Mr. Lewinson: I am quite serious and earnest in believing that if your Honor gives me an opportunity to present this cause—I have worked on the matter almost continuously since your Honor adjourned the case the last time, and I think I can aid the court in arriving at a conclusion which will be more satisfactory to the court than otherwise. If the court gives an opportunity to me to argue the matter I think it would be time well spent.

The Court: I am not going to deny you the right of oral argument. I have been known to change my mind and I may be wrong in this instance, but in this particular case when there has been, in my opinion, a deliberate plagiarism I will only change my viewpoint because I feel the law will not permit me to protect Mr. Lloyd in his copyrights.

Mr. Lewinson: It is a question as to the extent of his copyright. I really think that I can be helpful to the court in presenting that point. I doubt whether this matter has been presented to the court in any previous case. This involves a different question than is ordinarily involved and I realize that the court's present disposition is the other way, but still with that in mind I make the suggestion for oral argument because the study that I have made leads me to believe your Honor will change your mind.

Mr. Abeles: Your Honor, there is just one thing I want [514] to say. It will take me just a moment. You recall I mentioned that I was attorney for Brunswick-Balke-Collender Company upon the appeal to the Circuit Court of the case of Davilla vs. Brunswick-Balke-Collender Company of New York, 94 Fed. 2d 567. In that case, your Honor, I did not handle the matter in the court below but I took it on appeal, and I had a re-argument there before the District Judge and the same thing came up as today. The court felt in that case the sum of approximately \$1200.00 profit was not sufficient to compensate the plaintiff and the court awarded \$5,-000 upon the idea that it could award, if the profit was not sufficient or if the proportion of the profit was not sufficient, if your Honor please, to compensate the plaintiff, that the court could award statutory damages, and in that case the court awarded \$5,000 damages. I took it to the Circuit Court and it was reversed upon the ground that it being profits the court had no right or authority to award statutory damages. That was only a yardstick in the event damages could not be proved and there were no profits, but there being profits there had to be an apportionment of the profits.

The Court: There is a difference between that case and the one we are trying here. I am not talking about statutory damages. There is evidence in this case upon which I believe the court can make a finding of actual damages.

Mr. Abeles: I understood your Honor was not letting that [515] evidence in upon the ground you could not compare one picture to another.

The Court: I have taken the position, either rightly or wrongly, that if this picture before the infringement

had a value and then after the infringement it had no value, the difference would be the actual damages suffered by Mr. Lloyd, which is the common rule of arriving at damages. Now, if Mr. Lloyd is entitled to recover, I feel that \$4,000 would be insufficient compensation.

Mr. Abeles: The defendant cannot be penalized, Judge.

The Court: I am not penalizing him. I realize that the defendant cannot be penalized. All that I can do is to award the damages suffered by Mr. Lloyd caused by the acts of the defendants.

Mr. Abeles: How is he damaged? He has a picture that is shelved for 13 years. It has not been shown that he sold the re-make rights to any picture of this nature. As a matter of fact, the only picture that he says he sold the re-make rights to was that picture he testified to, Milky Way, and there is no price in the record—just imagine no price in there, no evidence at all. As a matter of fact, I was prepared, if they tried to establish a price, to show that they did not get a nickel from the picture. I was prepared to show that and they knew I was and they didn't put it in evidence.

Mr. Fendler: Just a minute. Let the record show at this moment that the— [516]

The Court: Counsel is not under oath.

Mr. Fendler: I know, but the statement is a statement that counsel makes without any foundation, your Honor. I feel that if, as your Honor has indicated, this case goes to the Ninth Circuit Court of Appeals the record should be clear upon what the evidence is that we were offering to show, and if there is any question about that we are going to ask that your Honor reconsider that particular ruling so that we may show that the

rights of Milky Way were sold by Paramount to Goldwyn for \$125,000, and that as an additional consideration Goldwyn loaned the services of Teresa Wright, an outstanding actress, to Paramount, and that Paramount paid Teresa Wright's salary at the same rate that she was under contract to Goldwyn for, and that contrary to the usual practice in the industry, the studio loaning out an outstanding actress receives additional consideration for her services, and we offer that for the purpose of showing that a picture comparable to *Movie Crazy*, produced from Paramount, released within a comparable period of time, with a comparable production cost, but which never even recouped its negative cost, was sold—the re-make rights were sold for \$125,000 plus the value of Teresa Wright's services.

The Court: I am not going to argue those facts with you nor listen to such an argument. I have seen the pictures. I have heard the witnesses. I think the court is in a better [517] position to weigh the evidence before the court than counsel for either side.

I know when this case is finished neither side is going to be happy. I am going to give each side, however, full opportunity to take every issue involved to the Ninth Circuit. I shall make my findings just as complete as possible so that when either one of you or both of you take it to the Circuit Court every issue may be decided. And my decision will contain sufficient findings of fact so that there it can be modified or reversed without the necessity of returning it to this court for re-trial.

Mr. Lewinson: Does your Honor want to fix a time now for oral argument?

The Court: How long do you gentlemen desire in order to prepare additional briefs based on what has already been submitted?

Mr. Fendler: I have a three-page answer to counsel's 58-page memorandum which I desire to file. That is the only additional brief I have, and our position on damages is fully set forth in the brief which was mis-filed, but which is now correctly filed. However, I do wish to orally argue the law on the damage situation for approximately 20 minutes, but not over 30 minutes. I am willing to do that now or any time the court may see fit.

Mr. Knupp: So far as this question of damages is concerned, [518] we would like to submit and we will submit it before the time of oral argument, a brief resume of our position, with a statement of the case, but I assure your Honor it will be brief.

The Court: Gentlemen, I am not going to set this down for oral argument until I have had an opportunity to study the briefs. The one brief of some 58 or 60 pages being presented only a day or two before the time of the trial puts the court at a distinct disadvantage. Briefs filed within such a short time of the trial date do not serve the purpose for which counsel have intended them to serve. In other words, unless I study those briefs and give them careful consideration the time in their preparation has been wasted.

Mr. Knupp: I suggest to the court, if it is satisfactory, that we be given a limited time in which to file any additional briefs we want to file before your Honor proceeds to the question of oral argument.

The Court: How long do you want?

Mr. Knupp: Ten days.

The Court: I do not feel I would have time to go over them before December 10th. That being true, I will set it for oral argument at 2:00 o'clock December 10th.

Mr. Fendler: That is satisfactory, but I would like to have ten days in which to reply.

The Court: If you feel you need ten days in which to reply then I will set it down for argument at two o'clock on [519] December 17th.

Mr. Fendler: That is satisfactory.

Mr. Abeles: Then we will have an opportunity to reply to his brief. I read some of his briefs. We put in a brief and he takes the cases and messes them all up. I mean you have got to go back and straighten him out because he never puts the facts down or the law the way it is. He just jams it up.

Mr. Fendler: I am making no comment.

Mr. Knupp: If the court please, there is only one other thing. We want to reserve the right to file a motion to strike. I suppose we may submit that in writing at any time?

The Court: Yes. We will adjourn this matter until two o'clock December 17th.

(Whereupon, at 3:35 o'clock p. m., the hearing in the above entitled matter was adjourned until 2:00 o'clock p. m., December 17, 1945.) [520]

Los Angeles, California, Monday, December 17, 1945

10:00 a. m.

The Court: Are you ready to proceed, gentlemen?

Mr. Knupp: We are ready.

Mr. Fendler: Ready for the plaintiff.

The Court: Gentlemen, I have viewed the Columbia short called Three Wise Saps. I feel the record should show that I saw that picture under stipulation of counsel and that it should be considered as a part of the evidence in this case.

Mr. Fendler: It may be so stipulated and marked.

Mr. Knupp: Yes.

Mr. Fendler: As Defendants' Exhibit next in order.

Mr. Knupp: I think it has already been designated by an exhibit number, if the court please. It may be necessary to bring it in and have it actually marked by the clerk.

The Clerk: It has been marked.

Mr. Knupp: Was it actually marked, Mr. Clerk?

The Clerk: Yes.

Mr. Knupp: Identified by an exhibit number but I did not know whether it had ever been marked. We would like permission to bring it in if it has not and have it marked.

The Court: It should be made a part of the record in the case.

Mr. Fendler: So stipulated.

The Clerk: It is Defendants' Exhibit E. [523]

The Court: Gentlemen, this is the time set for oral argument. I feel in view of the fact that nearly 200 pages of briefs have been submitted to me it is no more than fair that counsel be restricted in their oral argument to matters they have not heretofore presented in their briefs.

Mr. Fendler: I shall be very glad to restrict myself to matters which are not covered in my briefs. I shall not cite any additional authorities but I do wish to call a few matters to your Honor's attention. Also I think there is an offer of proof which your Honor directed be filed in writing.

The Court: That will be deemed filed for the reasons heretofore stated. The evidence has been rejected.

Mr. Knupp: We have a motion to strike, if the court please, which is filed pursuant to the permission which the court gave us which relates to the evidence which has been offered in connection with the value of the motion pictures or scenarios other than the one which is involved in this suit.

The Court: I have not admitted in evidence any valuation of other pictures, have I?

Mr. Knupp: The motion to strike went to the question, if the court please, whether or not opinion evidence with respect to the value of the Lloyd picture before the Universal picture was made and the evidence with respect to its value after the Universal picture had been produced and [524] exhibited. We contended of course, if the court please, that evidence was entirely speculative and conjectural and damage could not be fixed in that way because of the uncertain character of the proof. I think that was the ground upon which the objection was first raised in this court. It was in connection with the opinion of some witness who was offered by the plaintiff seeking to establish the value of the re-issue rights and re-make rights of the Lloyd picture *Movie Crazy*.

The Court: I understood that I had restricted the evidence as to any particular picture except as was brought out in qualifying the various experts. Of course you ob-

jected to the receipt of opinion evidence, as to the matter of damages.

Mr. Knupp: That is right, if the court please, and that is the only matter to which this motion to strike is addressed.

Mr. Lewinson: May I make a suggestion, your Honor? My impression was that the understanding was that we might make this motion prior to the opening of the arguments, but that your Honor would not rule on it until you decided the case because obviously there would be no point in ruling on the motion pro forma now because that would be just the same as having ruled on the objections.

The Court: I have ruled on the objections. [525]

Mr. Lewinson: But subject to a motion to strike and we are now making the motion to strike, and it may be that at the conclusion of the arguments when your Honor comes to determining the case you may reverse that ruling. I understood that is what your Honor had in mind when you suggested that the evidence might come in subject to a motion to strike because as I took it your Honor did not want to slow down the trial by having an elaborate presentation on that at that time.

The Court: The court tries at all times to keep an open mind. Naturally if I have committed any errors I want to correct them.

Mr. Lewinson: That was the thought underlying my suggestion.

Mr. Knupp: May we then file this motion at this time?

The Court: Yes. You may proceed.

Mr. Fendler: Now, if your Honor please, there are one or two matters that I would like to direct your Honor's

attention to, which may have been done indirectly in the brief, but at least not to the extent that I feel is desirable.

In the first place, I think it proper to point out to your Honor that the defendants in this case have assumed a very inconsistent attitude and argument in connection with their position as to— [526]

The Court: Mr. Fendler, under my present state of mind I prefer to hear from the defendants.

Mr. Fendler: Very well, your Honor.

Mr. Lewinson: May it please the court, in presenting oral argument in this matter we have had in mind the suggestion that your Honor has made and we will not undertake to repeat what is in the brief nor to take the matter up in the same way that it is presented in the briefs. On the contrary we will attempt to present background matter which will aid your Honor, we hope and believe, in the examination or re-examination of the cases and in reaching a conclusion.

We would like first again to take up the matter of liability. As to the questions elaborately presented in our brief, which is entitled "An Additional Brief," we will have only a little to add to what is said there and that will be by way of emphasis and high-lighting several matters that appear in the brief.

We think the matter is as fully presented as we know how to present it except for a few additions and comments and therefore we will not take much time on this occasion in threshing over the old straw.

However, there is a point as to liability which has developed rather late in the writing of the briefs and is referred to in the two last briefs filed by Mr. Fendler and briefly referred to in the last brief filed by us. That [527] point we would like to elaborate because we think

it is decisive of the case and is not presented in the brief with anything like the fullness with which it can be presented on oral argument.

Our point there, your Honor, is this. That the plaintiff is not entitled to recover because it appears that the picture *Movie Crazy* was made "off-the-cuff" so to speak. That is to say, it was not based upon a scenario and therefore it is not entitled to the protection of a dramatic composition but is only entitled to be regarded as a motion picture under the 1912 Amendment and has the status of a photograph. In other words, it is entitled to protection against multiplying of copies but it has no performing rights.

Now, there is only one case in which that point has been raised, and that is the case of *Metro-Goldwyn-Mayer v. Bijou Theatre*, which is in the 59 Fed. (2d) in the Circuit Court of Appeals for the First Circuit. That case is three times reported. It is reported in the District Court prior to the appeal in the 50 Fed. (2d). It is reported in the 3rd Fed. Supp. after the mandate came down.

Now, in that case in the Circuit Court of Appeals it was definitely held after a full review of the statute and after some attention to the statutory history, that even under the 1912 Act in order to be entitled to the classification as a dramatic composition the picture had to be based upon a copyrighted writing which must either have been a novel, scenario, or play, or some other writing.

When the mandate came down in the 3rd Federal Supplement for reasons which do not appear in the opinion, the District Court did not file the mandate. The mandate filed provided for the dismissal of the case unless there were an amendment showing that the picture was based

upon a copyrighted writing, but the amendment was not made in that form but the complaint was nevertheless sustained.

I shall refer briefly to the cases themselves in a few moments, but before doing so I would like first to follow the practice which was followed by the United States Supreme Court in the latest case involving a copyright question. In order not to slow down the argument by making it necessary for your Honor to take down citations or the reporter or Mr. Fendler to do so, I will hand your Honor a list of those authorities to which I shall refer during the course of this branch of the argument. These authorities, with one exception, I think are not cited in the briefs. I would like for the record to show I am now handing the reporter a copy and also a copy to Mr. Fendler as well as the court.

Now, the first case cited in the list of cases to which I have referred, your Honor, *Fisher Music Co. v. Witmark & Sons*, 318 U. S. 643, decided in 1943. That was a case which [529] did not involve a question similar to the question here but on the contrary it involved the question of whether a copyrighted work was assignable as to the second term for which it might be copyrighted prior to the commencement of that term, and the Supreme Court, the United States Supreme Court devoted ten out of the twelve pages of the opinion to a survey of the history of the statute going back, not only to the statute of 1790 but also to a statute 50 years earlier and then took the legislative history of the Act of 1909, which was involved, and determined the meaning of Congress in the Act from both the statutory history and the legislative history.

Now, it is not going to be necessary for me to go back here as far as the court went in that case, but I do think that a reference to the earlier statutes and the decided cases before the 1909 Act, a reference to the legislative history of the 1909 Act and the history of the legislative history of the 1912 Amendment will be most informing and demonstrate that the decision of the Circuit Court of Appeals in the Metro-Goldwyn-Mayer case is not only persuasive but should be followed here, and I invite your Honor's attention to such a survey of the statutes.

Now in the first place, your Honor, it will only be necessary for me to mention a fact which is already well known to your Honor and that is that prior to 1856 there was [530] no such thing as a protection of performing rights under the Copyright Act. The only protection there was up to that time was a protection against multiplication of copies. In other words, the Act dealt solely with books, maps and similar documents which had to be printed and could not be multiplied or copied. That is the true sense in which copy was used. In 1856 the dramatic or performing rights were introduced and they are known in the cases sometimes as play rights. In other words when you had a drama the Act provided that performing rights were entitled to protection; and except for one change the law is substantially the same in 1909 and 1912 as it was in 1856 in that regard, but there is a very definite difference between the 1909 Act and the earlier acts in one respect, but the difference is not controlling here as against us. On the contrary, it is controlling in our favor.

Now, prior to the 1909 Act, your Honor, nothing could be copyrighted unless it was printed and the manner of filing in the copyright office was different. The procedure

was different than it is at the present time. We need not deal with that but it is important to bear in mind that a drama as well as a book in order to have any copyright protection had to be printed.

Now, the Act of March 3rd, 1891, which was the Act enforced prior to 1909 amendment, specifically so provided. [531] I have in my hand, which I will be glad to leave with the court, if your Honor cares for it at the conclusion of the argument, all of the copyright Acts from 1790 to 1906, published by the Library of Congress, and that Act is found on page 60 of this book at line 25. That is the second authority which is cited in the list of authorities and provision is made for printing.

Now, the United States Supreme Court had occasion to pass upon the effect of the requirement of printing prior to the time of the 1909 Act and it passed upon it in the case of *Ferris v. Frohman*, which is the third case noted here, which is reported in 223 U. S. 424, 56 L. Ed. 492, decided in 1912.

Now, that case was decided under the 1891 Act and Justice Hughes, as he then was, reviewed all of the Acts prior to that time and pointed out that printing was required. That case came up in this way. There was a stage play which had been presented in England and under the provisions of the English statute if a play were played without being copyrighted, the English law being different in that respect than our own law was at that time, then it was dedicated to the public.

Now, this play was played in England and the defendant obtained a copyright in the United States and the plaintiff Frohman, who of course was a well known producer, acquired [532] the rights to the English work and he brought an action to vindicate his common law rights

against the person who had obtained the copyright. The person who obtained the copyright claimed that the matter had been dedicated to the public by the performance in England and Justice Hughes held it was not dedicated to the public in this country because the English law had no extra-territorial effect and under our law if a matter was not copyrighted and could not be copyrighted if it was not printed. This play was still in manuscript. He held then that the common law rights obtained and the Copyright Law was a false quantity in the matter.

Now, that case emphasizes the fact that up until 1909 it was necessary to have a play printed and published as a book before it could be copyrighted under the Act of Congress.

Now, let us refer to two cases as indicating what the status of motion pictures was before the 1909 Act, under the Act which I have already referred to and then I will come to the 1909 Act and inquire whether any changes had been made and I think it will appear that no changes have been made and then we will see whether any changes have been made by the 1912 Act.

The Court: Counsel, hasn't this been presented in your very voluminous briefs?

Mr. Lewinson: No, I have not presented it voluminously at all, your Honor. I only presented one short paragraph in [533] the supplemental brief on this point. I haven't gone into any of these matters. You will find it in the first section of the supplemental brief where there is merely a quotation, your Honor, from the case in the 59 Fed. (2d) on this point and—

The Court: Very well, proceed. I am willing to listen, but that is a point that has been considered by the court and it is my impression now that I got it out of some of the briefs.

Mr. Lewinson: Mr. Fendler in his reply cited a number of cases and reviewed them. Before reviewing these cases I think if I briefly present the matter to the court by way of this history and background material, which the Supreme Court of the United States now says is the way to look at these things, that it will help your Honor in reaching a conclusion as to the matter. May I proceed with it, your Honor?

The Court: You may proceed.

Mr. Lewinson: Now, there are two cases, your Honor, which show the status of motion pictures under the Copyright Act prior to the 1909 Act and they are the cases which are numbered 4 and 5 in this list of cases. None of these cases, your Honor, except one that is referred to here, which is cited by Mr. Fendler, have yet been cited to the court as far as I am aware. *Bleistein v. Donaldson Litho- [534] graphing Co.*, 188 U. S. 239, 47 L. Ed. That is an opinion of Mr. Justice Holmes and I would like to refer to it very briefly because it is the basic case on the subject.

Now, that case, your Honor, involved a circus poster which was prepared by the artist and published by a lithographing company—the celebrated Currier which preceded the firm of Currier & Ives, whose lithographs have become famous. This circus poster was made from groups in actual life and it was claimed that it was not subject to copyright and there was no protection because it was made from life and Justice Holmes said that others were free to copy the original. That is to say, to make another photograph by grouping the people together and making the same poster, but they were not free to copy the original. In other words, they could not multiply copies.

Now, that was applied to motion pictures very definitely in the next case in the list, American Mutoscope & Biograph Co. v. Edison Mfg. Co., 137 Fed. 262, and in that case which was decided in 1905, you had an early motion picture which was very similar so far as the burlesque feature of it was concerned as the pictures here. The plaintiff made a picture around Grant's Tomb. The idea was that a French nobleman had advertised in the New York papers for a woman to meet him or a girl to meet him at Grant's Tomb—"object: matrimony". She met him there and there were a flock of [535] other women and as a result there was a chase and they were running around and finally she overtook him and forced him to go on with his bargain and it was burlesque and slapstick.

The defendant made a similar picture which showed Grant's Tomb and much of the same scenery and the same sort of action, but it was not copied. It was not a multiplication of the copy of the plaintiff's picture, but it was a new picture and the court denied a preliminary injunction because the evidence did not show it was a copy. It was another picture made from the same thing.

Now, that was the status of motion picture, your Honor, prior to the time of the 1909 Act. In other words, they were copyrighted as photographs. They only had protection against multiplying copies. They did not have any protection against performing rights and we will see presently the same thing was true after the 1909 Act.

Now, let us take the 1909 Act, your Honor, and see whether the 1919 Act made any change. Your Honor will have in mind that the reason, the basic reason apart from whether pictures could be dramatic performances in and of themselves was that the Copyright Act did not

permit the copyrighting of anything that was not printed. Now, what did the 1909 Act do in that regard, your Honor? As I have already stated, the 1909 Act made a change but it did not make a change that affected the situation. In the 1909 Act [536] we have sections 9, 10, 11 and 12 and they provided for the copyrighting of both published and unpublished works. Section 11 dealt with unpublished works and it did not refer to motion pictures. There is some motion picture reference there, but it referred to works of an author of which copies are not reproduced for sale by the deposit with the claim of copyright of one complete copy of such work if it be a lecture or similar production or a dramatic musical or a photograph or other identifying reproductions. Now, that is all there was **there**.

The copyright office had occasion to interpret that by its rules and as a matter of fact the head of the copyright office testified at the 1912 hearings and said that up to 1912 the pictures were still copyrighted as photographs and only as photographs.

Now, if your Honor will refer to Section 201.4 of the Code of the Copyright office, Subdivisions 412 and 413, Section 201.6 with reference to unpublished works and 201.7 with reference to published works, your Honor will see that, to quote, "B" of 201.7: "Published works are such as are printed or otherwise produced and placed on sale, sold or publicly distributed." Now, that applies even in the present law. There is nothing here that is published or placed on sale. And as to dramatic work, Section 201.6 provides that the copy which may be written or type-written shall [537] be in convenient form, clean and legible. In other words, it is not possible to comply with the copyright law of 1909 (and I will point out that it is

not possible to comply with it even now as amended in 1912) and bring out a picture which is not based on a scenario under the provisions of dramatic productions.

Now for example in Subdivision 4 of Section 201.4 the court after dealing with dramatic compositions said: "Scenarios are descriptions of motion pictures or settings for the production of motion pictures and are not dramatic works themselves. However, when printed and published they may be registered as books." So that is a basic background.

Now, Mr. Fendler relies on two other sections of the Copyright Act of 1909, your Honor, both of which do not support his proposition and show that as in Zechariah Chafee, Jr. in his article points out, and this is in 45 Columbia Law Review 503, 719, that the Copyright Law of this country, unlike the Copyright Law in England and Canada does not give a general monopoly. It consists of separate monopolies as to separate things and separate remedies.

Mr. Fendler relies on Subdivision "B" of Section 1 that was passed upon by the court in the case to which I have referred and he speaks of "any other version thereof", and it says here, "If it be a literary work."

Now, the history of that, which is given by Mr. Chafee in the article in the Harvard Law Review at 512 to [538] 515—I should say the Columbia Law Review, is this: That prior to the amendment of 1909 the cases permitted the abridgement of a book and that was not protected by copyright and the purpose of this other version thereof is to protect the book which is abridged.

Now, there isn't anything here of that kind. And then of course he relies on the non-dramatic work and says he is dramatizing that. If it is a non-dramatic work, as

I already pointed out, it is necessary for it to be printed in order to have copyright protection and there is no showing of that kind.

He also relies on a sentence that was added to Subdivision "D" of Dramatic Rights in the Act of 1909 and says that that applied to motion pictures.

Now, I will give the history of it in a minute. It does not apply to motion pictures at all. It was aimed against motion pictures—that is beginning with the procuring or making of any transcription or records thereof and so forth.

Now, he says that applies to motion pictures. Here is the history of that provision, your Honor, as found in the arguments before the committee, which is indicated here. The Supreme Court had decided the Music case by which it held that a musical composition was only pirated when a copy was made of the notes—that a pianola record did not pirate it. Now, at the time this bill was pending in Congress, and it [539] was pending from 1905 to 1909, to February—to March 4, 1909 before it was passed. The case involving the producers of Ben Hur had arisen in the District Court of New York but it had not yet reached the Circuit Court of Appeals or the Supreme Court. It was held in that case in the lower court that the making of the picture Ben Hur was an infringement of the copyright of the novel Ben Hur. The Supreme Court later pointed out that the only thing that was involved there was the infringement on the novel and not the infringement of a picture or something else. It is a very different question. All right.

The people that waited on the committee of Congress were not the picture people seeking protection but the legitimate drama representatives who themselves were

seeking protection against the picture people and this provision was included to protect the legitimate drama.

I can give your Honor the page reference to the hearings on that if your Honor cares for it. I have it here. As a matter of fact, that section was drafted by the counsel for the legitimate theatre people and was presented by their attorney on March 26, 1908 and the attorney was Mr. Johnson. He made his argument and presented his amendment which was adopted almost verbatim, and if your Honor will permit me I shall not read his argument—

The Court: Counsel, let me say this. I realize your [540] theory presents some question of doubt but I am going to let the Circuit Court of Appeals settle that doubt.

Mr. Lewinson: I think if your Honor will permit me to continue it will not take more than 15 or 20 minutes to present this feature of it.

The Court: I am perfectly willing to listen to your argument, but I am advising you in advance you have a point that, so far as I am concerned, the Circuit Court of Appeals is going to have to settle.

Mr. Lewinson: Well, if your Honor's mind is closed on the matter I do not want to take time to present further argument, but, your Honor, I have spent a great deal of time going over this. I have developed the history of it. I have developed the reports of the committees and the history of it and the language of it; the construction made by the Copyright Office which the cases say is entitled to the greatest weight, but I am not going to take the time to present an argument if your Honor does not care to hear it so I will break off.

The Court: I am not saying that I do not care to listen to your argument. I am only saying that this case has been one of my burdens for a number of months.

Mr. Lewinson: I realize that, your Honor.

The Court: And as far as this court is concerned it is going to make its findings sufficiently broad so the Circuit [541] Court can pass upon all your points.

Mr. Lewinson: Well, your Honor, I had hoped that your Honor's mind might be open on the matter and that the presentation of the statutory and legislative history and the authorities—

The Court: I fully realize the point you are making and the court has considered it very carefully. If the industry hasn't sufficient protection and one company can pirate upon the other because it does not happen to have a manuscript copyrighted I think the sooner the industry knows it and throws it open to the wolves the better.

Mr. Lewinson: That isn't, I think, quite the case, your Honor, and I would like to make this closing observation on the point.

Now, when it came to the 1912 amendment the picture companies were only interested in Section 25 which related to damages. That is all they asked for. It was the copyright office itself which, for administrative purposes, introduced the change in Section 12. In addition to that the case in the Circuit Court of Appeals had been decided in 1931, so when this picture was released in 1932 Lloyd could have had a scenario if he wanted to. He did not have it copyrighted. If he did not have his scenario copyrighted he would still have had common law rights in the scenario and that would have given him protection as it gave Frohman pro- [542] tection. However, he made the thing on the cuff so the matter does not involve

any present great issues as to what the industry is doing, because they either copyright their scenarios or they have scenarios and they are either entitled to copyright protection of the scenario or they are entitled to common law protection if they don't do it.

Now, if Lloyd chose to make his picture on the cuff after the matter had been presented to the courts and after the courts had decided that he had no protection—no copyright protection when he did it that way, that was his affair and it does not involve any matter of upsetting settled practices that have been built up since 1932.

Your Honor, I shall not present that point any further because I would rather have your Honor retain some strength and patience for the presentation of the other points on which your Honor has not made up your mind.

Now, I do not know whether there will be any point in saying anything further about the points that are elaborately made in the brief about burlesque not being entitled to copyright protection. Has your Honor made up your mind on that point?

The Court: I have studied the briefs and have reached a definite conclusion relative to the case and am ready to close it now.

Mr. Lewinson: I would like to make just one suggestion [543] on that if I may, with due deference, and that is that your Honor re-examine the case of *Whitwer v. Harold Lloyd*. I think you will find there, your Honor, that the burlesquing which was taken and which the Circuit Court of Appeals of this Circuit held was not entitled to copyright protection was of the same character as that here except that it was the climax of a story and it isn't the climax of a story here at all and plays no integral part of it. I think if your Honor will also re-

examine the cases which deal with these murder scenes and other scenes you will find that more of a dramatic nature was taken there than taken here. Now, if upon a re-examination of those features your Honor does not change your mind there isn't anything I can do to help you change it.

Now, I would like to call your Honor's attention to one particular statement, which is the closest we come to a generalization, and that is *Frankel v. Irwin*, 34 Fed. (2d) 142. The case is cited in our 58-page brief at page 39.

The Court: That is cited in your brief.

Mr. Lewinson: Yes, but there is just one sentence I would like to read if I may and that is the court referred to "Farces, which, unless at least suggestive of genuine human thoughts, desires and intents, are mere slapstick clowning." And I think that fits this like a glove, and if your Honor will consider that is the *Whitmer* case and the other cases to which I have referred, there isn't anything further that I [544] can say on that.

There is, however, something that I would like to say briefly on the question of damages, your Honor, although Mr. Knupp will follow me at greater length on that point. It may be that the question of whether a picture not based on a scenario at all is entitled to protection as a drama is doubtful, which your Honor apparently thinks it is—

The Court: I would not say it is not doubtful, but I am going to make my ruling and let the Circuit Court clarify the law in that respect.

Mr. Lewinson: Well, I was merely saying that by way of introduction.

The Court: I am not saying there is nothing to your argument. I do not want you to get that thought at all.

Mr. Lewinson: I did not get that impression.

The Court: There are many points that have been brought up and discussed in this case and frankly I haven't too much confidence in my position.

Mr. Lewinson: I appreciate your Honor making that statement. I did not intend to invade your Honor's ruling or suggest anything contrary to what your Honor has said. I said, "assuming", and I will put it that way, that it may be doubtful, but I do think, your Honor, there is no doubt about this, that plaintiff is not entitled to any copyright protection of re-make rights. [545]

The Court: You have presented that in your briefs, counsel.

Mr. Lewinson: I was going to call your Honor's attention to something else on this version of the matter, but I will pass it, your Honor. I think I shall let Mr. Knupp take up the matter of damages. I had some observations to make but perhaps a fresh mind and a fresh presentation will engage the attention of the court better than anything I can do.

The Court: Counsel, as I have stated before, I have taken this case home with me. I have lived with it. As I stated before, I am not entirely confident that I am right, but the course that I have followed I believe is right and I believe is just and that is as far as I can go.

Mr. Lewinson: Certainly.

The Court: All counsel have presented their case well. They have well represented their clients. They have presented every possible point that able counsel could muster but I am still of the opinion I have heretofore indicated.

Mr. Lewinson: Well, in the spirit of my duty to my client and my duty to the court I have attempted to inform the court as to what we think is the law and even though the court does not accept our views we certainly appreciate the spirit in which the court has handled the case. Your Honor has shown not only a desire but a zeal to do the right thing in the case. The court has not only conscientiously waded [546] through voluminous briefs but has given us every opportunity to present our oral argument and I appreciate it even though I may make no headway on my oral argument, and I want to thank your Honor for the consideration that you have given to the case and for the personal consideration you have given to me.

The Court: The court never resents able counsel vigorously presenting their case. That is one thing that helps the court. It so happens in this case that I feel you are wrong.

Mr. Lewinson: Well, that may be, but I thought we might be able to present the matter more fully but I realize your Honor must control your own court, and I can only say again that I appreciate the spirit in which your Honor has handled the case. I have no personal complaint to make. I feel your Honor has treated me as a lawyer and as a gentleman and given me every consideration to which it thought I was entitled.

The Court: Mr. Knupp.

Mr. Knupp: There are only one or two observations I would like to make if the court please, and I will try to confine myself to matters which have arisen either in the course of the last hearing and which consequently are not covered in the briefs or which are contained in the final brief of the plaintiff. [547]

There has been a lot of discussion and argument about the question of—assuming infringement is established, the plaintiff may be entitled to in the way of remedy.

We have sought to demonstrate to the court that under our view of the law profits having been established the proportionate part of those profits which is justly attributable to the infringement, is the only remedy which the plaintiff can have in this case and it is an entirely adequate remedy.

Now, the plaintiff has argued throughout that the statute, Section 25, which says that the plaintiff may recover damages as well as profits, means that he shall recover both damages and profits.

The Court: Counsel, I agree that plaintiff cannot recover both. It is my position that if there is actual damage and that actual damage exceeds the proportionate share of the profits to which he is entitled, that is all he is entitled to recover. In other words, he is not entitled to recover the actual damages plus profits because the law and statutes do not permit the imposition of a penalty. That is one thing we agree upon.

Mr. Knupp: Well, I am glad to get so far along toward being in accord with your Honor on that proposition. There was one case in particular which counsel referred to in his final brief, Bundy Engineering Co. v. Sheldon, in which he [548] says to the court in so many words that although the profits have been established in that case the court made an award—

The Court: Pardon me, counsel, but in this case I might as well tell you frankly that the court is going to find an amount as the actual damages which is in excess

of the 20 per cent as was followed in the Sheldon case and other cases. I am not going into the "in lieu damage question."

Mr. Knupp: Then that restricts my argument, if the court please, to just this one question, and that is whether or not there is any competent evidence here of damages and that I think has already been pretty thoroughly briefed. I only want to point out, and I think we have already pointed it out in our brief, that really this question is based upon opinion evidence as to the extent of the diminution in value between the re-issue and re-make rights by reason of the making and production and exhibition of this Universal picture, depends after all upon the reasons which those experts have assigned for believing that that was true.

Mr. Lloyd himself said that he thought his rights had been injured because of the fact that people would get tired of seeing this sequence and because the public would class him as an imitator. Well, as a matter of fact, I think the evidence here will establish that this Columbia picture which [549] was exhibited prior to the Universal picture was exhibited in more theatres and upon more occasions than was the Universal picture. Mr. Lloyd was entirely logical in his first statement that the damage was due to the fact that the public would get tired of seeing the sequence expressed and that without any question in his opinion the Columbia picture had done him some harm. He says in so many words, if I might just call your Honor's attention to it for just a moment, he said: "I would say it done me a great deal of harm if it had been played in all the theatres the other had played in," and he has reference there, of course, to the Columbia picture.

Then when he was brought back on the stand counsel asked him this question: "At the previous hearing, Mr. Lloyd, you testified that you did not know what theatres the Columbia short had been exhibited in nor the type of theatres it has been exhibited in or played in. By that you believed that the Columbia short might have done you a great deal of harm if it had played in all the theatres that the Universal feature picture *So's Your Uncle* played in. Do you desire to correct that answer?"

Then Mr. Lloyd said, "I have had time to think it over. My opinion is that a short does not compete with a feature picture. In the first place, a great many times shorts are purchased by the theatres but are not always shown. Many [550] many times—a great many times in the evening they haven't time to show them. Sometimes they are purchased and never shown. Another thing, in this particular short, the Columbia, it is one so badly and so unbelievably bad and it is in such a hodge-podge of comedy sequences that I cannot possibly see how that could do anything but very minor damage and certainly not keep us from remaking or re-issuing a picture.

"Q. In your opinion then the circulation of the Columbia short during the years 1942 and 1943 did not impair the value of the re-issue or re-make rights of your motion picture, is that correct?

A. That is correct."

I only want to suggest to the court that after all, Mr. Lloyd having based his opinion that the Universal picture had done him a great deal of harm upon the proposition that the public would be tired of seeing the sequence, he now comes right back and tells your Honor directly that he did not think that the exhibition of the Columbia picture had harmed his re-issue or re-make rights. So I

say that the very basis upon which he contends that he has been damaged has now been shown to be without substance. As a matter of fact, if the court please, Mr. Lloyd went to see this Columbia picture for the express purpose of determining whether or not any harm had been done to him by its production and exhibition, so that when he got on the stand in the first place and testified that [551] the Columbia picture had done him a great deal of harm he was not testifying as a matter of snap judgment. He got on the stand expecting to testify to that very thing. He had seen the picture in order to be able to testify to that very thing and when he comes back and tells the court that now he is satisfied the Columbia picture did him no harm, I say that it establishes his testimony is entirely untrustworthy. I do not think there is any more reason to think he would so testify with respect to the Columbia picture than there is reason to believe that if he was put on the stand again he would testify to the same thing so far as the Universal Picture is concerned. I cannot see any distinction between the two. They were exhibited in the same character of theatres and the Columbia picture was exhibited to more people, so if his basis for damage is that the public would grow tired of seeing the sequence I think his testimony is shown to be without merit.

There is one other thing in connection with that matter of damages I want to call to the court's attention and then I am through. Mr. Fendler had on the stand his last witness, Mr. Botsford and he asked him this question.

The Court: I know the testimony that you have in mind. It is set forth in the brief and I have that very thoroughly in mind when fixing damages.

Mr. Knupp: If the court please, it was a matter which [552] your Honor brought out by your examination of the witness, namely, the question of whether or not if he thought that the public would remember this sequence and as a result the re-make and re-issue rights were damaged and if so how long he thought it would be before the public forgot they had seen this picture. He said he did not have any opinion on that but it seems to me, if the court please, that is a matter of opinion that your Honor might as well entertain or I might as well entertain as any expert would entertain because, after all, the question of how long the public is going to remember having seen a particular sequence in a motion picture and it is going to know that it has seen the sequence some place when it goes to see a new motion picture is, I submit, a question where the common judgment of mankind is as good as any expert.

The Court: Do you have anything to say, Mr. Fendler?

Mr. Fendler: I do. I will ask for 15 minutes and I will confine myself to those 15 minutes.

The Court: I do not understand why counsel would want to argue when the court has indicated it is going to rule in his favor.

Mr. Lewinson: We haven't had very much luck. Maybe he can talk the court out of it.

Mr. Fendler: Nevertheless, if your Honor will indulge me for ten minutes, I do feel it my duty to call certain matters to your Honor's attention which were not mentioned in [553] the brief and which I think are proper to address to your Honor.

The Court: Proceed.

Mr. Fendler: In the first place, I wish to say that so far as any judgment which your Honor may render in this case, either for actual damages or statutory damages, you will be equally sustained by the record and by the authorities.

The Court: We will leave that to the Circuit Court. They are the best judge.

Mr. Fendler: May I complete that thought, if your Honor please? Counsel have argued that any apportionment of damage to the sequence taken is impossible for purposes of damages and their expert witness has testified it is impossible for the purpose of profits. Now, all of the authorities—the United States Supreme Court decisions and otherwise, do not make an impossibility of the apportionment but simply say it is difficult of apportionment—the test for the application of the “in lieu of the statute.” In other words, if your Honor should find difficulty in accurately assessing such damages as are sustained by the infringement or such profits as are properly apportionable to the infringement, the in lieu clause becomes applicable.

Now, I make this point for this reason. We have a case which may reach the United States Supreme Court. We have a case which may become an outstanding decision for the [554] industry. We have a case where the infringement is, to my mind, and I think to your Honor's, a flagrant one, and an infringement where it was deliberate. The producers of the picture were told they were taking it and they took it.

Now although counsel attacks Mr. Lloyd's credibility we do nevertheless have a situation where Lloyd would never have dreamed of letting the re-issue rights of that picture go for less than the figure given, or the re-make rights go for less than that figure.

We have offered the most honest witness and the best qualified witness that we could find in Mr. Botsford, who I wanted to turn over completely to your Honor for examination. Your Honor did ask him a few questions and then referred him back to me. In fact your Honor implied that you thought he was going to testify in my behalf anyhow so it did not make very much difference what I asked him, but the case was continued for the purpose of letting them get an outstanding witness or two and for the purpose of our getting an outstanding witness or two and we got this man who had been assistant to the Paramount Studios for ten years and head of the editorial board, and we thought he was outstanding and honest.

Now, when that man testified that the re-issue rights and the re-make rights of that picture had been destroyed by the Universal picture and that the Columbia short would not [555] have had that effect, we introduced and produced a man whom we felt was outstanding, a man who would give evidence which we felt your Honor would not question. We have introduced testimony showing that the industry will purchase properties for \$100,000, \$150,000, \$200,000 for the re-issue rights and did pay \$500,000 for the right to make a moving picture from a property which had not even been tried in motion pictures and where they did not know they would make a profit or not. The point I wish to make to your Honor is that a judgment which is not commensurate with the standards in the industry will not be effective for the purpose of either doing justice in the case itself or advising the industry as a whole as to what the consequences are if they take something without paying for it. In other words, no matter what has been said as to punitive ele-

ments a person is not punished who is required by the judgment of a court to pay the same amount which he would have had to pay the copyright proprietor if he had been honest in the first place.

Now, for just a moment I want to compare the Letty Lynton situation where Metro buys a book for \$3,500.00 dealing with subjects in the public domain and they do not buy the picture rights which are valued at \$30,000 for a play which has run for 10 or 12 weeks in New York and then they come up before the court and they say that any judgment in excess of \$30,000 is punitive because these people were willing to sell their property for \$30,000 and the court says "No, even [556] a judgment four times that amount is not punitive." And the logic back of that thing to my mind is that a person cannot steal a property that they don't buy and then come in and get by with the price they would have had to pay in the first place.

Now in that connection I want to direct your attention to the long line of United States Supreme Court decisions from *Brady v. Daley* on down. Those cases all provide that the statutory penalty is not a penalty. Now, the point I want to make to your Honor is that regardless of whether your Honor adopts the actual damage or statutory damage, if your Honor will permit me to say so, the judgment should reflect something commensurate in the motion picture world with the value of the property taken, and that a half measure or a quarter measure does not do that.

It is all very well for them to argue as they have in their briefs—"It just takes a few minutes. It doesn't mean anything." And so on, but the evidence before your Honor was that this picture was in production for 21

months and if your Honor has been on the motion picture sets, as perhaps you have, you know sometimes they will spend a day shooting the same scene 30 or 40 times and this sequence regardless of the short length of time could very well have taken six or seven or eight weeks of the time of directors, assistant directors and so forth, and the same with camera [557] men and technicians—the extras, and so forth. There is a great deal of money put into such things and these figures which have been given your Honor that this sequence alone cost the Lloyd Corporation \$150,000 or thereabouts, are not manufactured figures. They are not fabricated figures. They may seem to your Honor to be more than your Honor would spend if your Honor was producing motion pictures, but nevertheless it is the industry and all I want to say to your Honor is, that we did not have any idea of coming in here and getting statutory damages on the statutory schedule for something we were not entitled to or something that has not been done to us. If that were true it would have gone into national debt figures, but in this case we felt sincerely and conscientiously, and I know Mr. Lloyd did. There is no reason for attacking him as being a thief, a crook or untrustworthy or anything of that sort. He came to your Honor honestly and he said frankly, and we have supported those figures. We have supported it with Mr. Landau, who was their own witness, and we feel very strongly, if your Honor please, that no company should get by with stealing our property and compelling us to come into court and then hope that they can get by with less than the price they would have had to pay for it in the first place.

I want to thank your Honor for the consideration and courtesy that has been shown me. I am sorry for my

share [558] of the burdensome briefs and I am sorry if I have talked out of turn, but we do appreciate your Honor's very careful and exhaustive consideration and we are sorry that it has taken so many weeks and months. [559]

Opinion of the Court

Gentlemen, when this case was presented to me and a jury trial was waived, I realized certain responsibilities were being placed upon the court. I am sorry now that I consented to the waiving of a jury trial. I would prefer to have had the question of damages submitted to a jury.

I have listened to the fanciful figures that come out of the financial world at Hollywood and it is difficult, if not impossible, for a judge who is not a part of that atmosphere to comprehend or appreciate such fantastic figures. That has been one of my difficulties in this case.

The day I saw both of the pictures involved in this litigation I realized that in my own mind there had been an infringement of the rights of the plaintiff. I do not look upon this so-called magician coat sequence as a slapstick affair. While it only takes a few moments or a few minutes to be exhibited, it still has a story. It has a theme that is a part of the whole picture and the defendants have appropriated that sequence which, according to Mr. Lloyd's testimony, was one of the outstanding sequences of his career and I feel that by reason of that there has been suffered by Mr. Lloyd substantial damage.

I look upon the Columbia short very much as Mr. Lloyd looked upon it in his testimony. After witnessing it I realized it was the same theme and in a crude way some of the [560] same incidents were portrayed. But the offending picture, the Universal picture, was not even

camouflaged, and as the evidence shows, it was deliberately appropriated. I don't know how such things happen in the industry. I do not understand how a company with the standing and reputation of the defendant corporation could be involved. However, I do feel that the Columbia short has minimized the actual damage suffered by Mr. Lloyd.

We have on the one hand claims of damages in the amount of \$300,000 and on the other hand no damage at all. There is no in-between judgment.

It has been brought out in the evidence in this case that the film, after it has had its run is virtually placed in cold storage and becomes a part of the stock pile for use again at some other date either by the owner or somebody to whom the owner sells the rights to that picture. The evidence also discloses that there is an open market for films that have been successfully displayed.

The fact that you can pick up almost any newspaper and in looking through the ads covering pictures that are on display you will find several that are indicated to be remakes or re-issues. I believe in one paper that was called to my attention the other day there were six pictures that were being re-issued.

I feel that the Harold Lloyd picture was a good [561] picture. I enjoyed it at the time I saw it. As a matter of fact, that was the first time I had seen it and I do know that the sequence involved was one of the outstanding sequences. I find that that is about the only sequence that people who saw the picture in days gone by remembered. When you ask a person: "Have you seen the picture?" they say, "I don't remember it." And then you tell them about this sequence and then they start to tell

you about it and it is a matter of more or less common knowledge that that was an outstanding sequence. Mr. Lloyd testified, I believe, that he estimated his damages at \$300,000. I cannot accept that figure. I do not believe that the re-issue value of a picture that originally cost \$650,000 or thereabouts, is worth fifty per cent of its original cost after the lapse of time involved here. Similarly I am not impressed with the claim that the value of the picture has been completely destroyed. I feel that that picture still has and will continue to have certain value after a lapse of a reasonable length of time.

On the question of profits I am going to adopt the rule and the reasons for it as set forth in the Sheldon case. I believe that 20 per cent of the net profits would be and I so find, as a reasonable apportionment. As I said before, the court finds it difficult to even attempt to deal in the figures that come forth from Hollywood. As I said before and [562] it was approved in the Sheldon case, the same rule should apply here as in a patent case. It is not my function to penalize the defendants. There is a penal statute for that. It is my function to try to ascertain an amount that I believe is the actual damage suffered and in arriving at actual damages I base them upon what in my opinion is the lessened value of that copyright. In other words, I believe that in a case of this character the only way that actual damages could be established would be to determine the lessened value of the picture by reason of the infringement. There may be other ways, but that is the method that I have followed in this case. I find and fix the actual damages suffered by Mr. Lloyd in the sum of \$40,000.00. Then comes the question of attorneys' fees. I do not know whether counsel have any comments to make on that subject but I do

know that three or four attorneys have kept Mr. Lloyd's attorney very busy for many months and able counsel have kept him certainly, using a slang expression, "on the run", and I feel that the sum of \$10,000.00 is a reasonable attorney fee in this case.

It may be because I am not a part of the atmosphere of the Hollywood financial world that I have been unfair to Mr. Lloyd, but I can only approach it from my own background. At different times during this case when I have endeavored to bring the parties together I warned you that probably when [563] we finished neither side would be happy because when one person insists on \$300,000 I move the decimal point over, and the other party who believes they are not entitled to anything has to pay something. That means nobody is happy.

The attorney for the plaintiff is directed to prepare and submit proposed findings of fact and judgment.

Mr. Fendler: Will your Honor order a permanent injunction?

The Court: As to the injunction I want to say that one reason I believe this picture still has a value is not because of the testimony of one of the expert witnesses entirely but also by reason of the fact that plaintiff's counsel was insisting on an injunction. Now, if his picture had been completely destroyed then there would be no occasion for an injunction and that has been one of the thoughts in my mind that caused me to come to the conclusion that the picture and the rights thereunder had not been completely destroyed.

Mr. Fendler: May there be an impoundment, if your Honor please, and a destruction of the defendants' portion of the picture dealing with the magician's coat sequence?

The Court: I think an injunction is sufficient.

Mr. Fendler: Thank you, your Honor.

The Court: I want the record to show that your motion to strike is denied, gentlemen, so your record will be clear. [564]

(Whereupon, at 12:00 o'clock noon, the proceedings in the above-entitled matter were concluded.)

CERTIFICATE

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 8th day of October, A.D., 1945.

ALBERT H. BARGION

Official Reporter.

[Endorsed]: Filed Feb. 21, 1946. [565]

[Endorsed]: No. 11286. United States Circuit Court of Appeals for the Ninth Circuit. Universal Pictures Company, Inc., a Delaware Corporation and Clyde Bruckman, Appellants, vs. Harold Lloyd Corporation, a California corporation, Appellee. Harold Lloyd Corporation, a California corporation, Appellant, vs. Universal Pictures Company, Inc., a Delaware Corporation and Clyde Bruckman, Appellees. Transcript of Record. Upon Appeals From the District Court of the United States for the Southern District of California, Central Division.

Filed March 28, 1946.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 11286

(Civil Action No. 4361-BH, District Court, Southern
District of California, Central Division)

UNIVERSAL PICTURES COMPANY, INC., and
CLYDE BRUCKMAN,

Appellants,

vs.

HAROLD LLOYD CORPORATION,

Appellee.

APPELLANT BRUCKMAN'S STATEMENT OF
POINTS ON APPEAL AND DESIGNATION
OF PARTS OF THE RECORD

Appellant Bruckman (hereinafter sometimes referred to as defendant Bruckman) makes the following statement of points upon which he intends to rely upon this appeal:

1. Plaintiff's complaint does not, nor does any count therein, state facts sufficient to constitute a cause of action or to entitle it to relief.
2. The court erred in denying defendant Bruckman's motion to dismiss plaintiff's complaint.
3. Plaintiff did not prove a cause of action against defendant Bruckman, or show that it was entitled to relief against defendant Bruckman.
4. The court's findings of fact are insufficient to support the judgment.
5. The court's judgment is contrary to law.

6. The evidence shows that plaintiff's motion picture entitled "Movie Crazy" was not entitled to protection under the copyright laws of the United States because said motion picture was not original but was commonplace.

7. The evidence shows that plaintiff's motion picture "Movie Crazy" was not entitled to protection as a drama or dramatic composition under the copyright laws of the United States because said motion picture was not based upon a copyrighted book, play, scenario, or other similar writing, and was not based upon a book, play, scenario, or other similar writing at all.

8. The evidence shows that the portion of plaintiff's motion picture entitled "Movie Crazy" referred to as the magician's coat sequence or comedy routine was not entitled to protection as a drama or dramatic composition under the copyright laws of the United States, because it consisted of entertainment other than drama or dramatic composition, and it was commonplace and not an integral part of the story in "Movie Crazy".

9. The evidence shows that the portion of plaintiff's motion picture entitled "Movie Crazy" referred to as the magician's coat sequence or comedy routine was not infringed by the motion picture "So's Your Uncle", because none of the matter embraced in the motion picture "So's Your Uncle" was an impression or copy of the matter embraced in said magician's coat sequence or comedy routine.

10. The court's finding that during the period of years commencing July 30, 1928, and continuing intermittently to and until December 23, 1933, plaintiff paid defendant Bruckman sums of money aggregating \$135,000.00 or more, including the sum of \$42,900.00 for said defend-

ant's services and assistance in writing and directing plaintiff's motion picture entitled "Movie Crazy", or paid said defendant any specific sum for said services and assistance, is without support in the evidence, and is contrary to the evidence.

11. The court's finding that the so-called magician's coat sequence was copied and misappropriated by defendant Bruckman in defendant Universal Pictures Company, Inc., motion picture photoplay entitled "So's Your Uncle" from plaintiff's motion picture photoplay entitled "Movie Crazy" is erroneous in that it is without support in the evidence and is contrary to the evidence; and the court's finding that the characters, characterizations, motivation, treatment, action, and sequence of action appearing in the fourth reel of the motion picture photoplay entitled "So's Your Uncle" were knowingly and willfully copied, misappropriated, and plagiarized by defendant Bruckman from a portion of the seventh and eighth reels of plaintiff's motion picture photoplay entitled "Movie Crazy", in that it is without support in the evidence and is contrary to the evidence.

12. The evidence shows that plaintiff did not suffer actual damage from the writing, production, distribution, release, and exhibition of the motion picture entitled "So's Your Uncle", and that defendant Bruckman did not participate in the writing or production or distribution or release or exhibition of the motion picture photoplay entitled "So's Your Uncle".

13. The court's finding that plaintiff has been damaged by defendant Bruckman in the sum of \$40,000.00 is erroneous, because it is without support in the evidence and is contrary to the evidence which shows that plaintiff

suffered no damage whatever, and said finding is based entirely on speculation and conjecture.

14. The court's finding that plaintiff's rights to re-issue and remake said motion picture entitled "Movie Crazy" were substantially damaged and impaired is without support in the evidence and is contrary to the evidence which shows that plaintiff's right to remake said motion picture is not protected by the copyright laws of the United States.

15. The damages awarded by the court against defendant Bruckman are excessive.

16. The court's judgment is contrary to law because plaintiff was not entitled to relief because it came into court with unclean hands.

17. The court erred in overruling the objections of defendant Bruckman to the evidence offered by plaintiff as to the value of its reissue rights of its motion picture entitled "Movie Crazy", as to the value of the remake rights of said motion picture, and as to the difference in value of said reissue rights and said remake rights before and after the production, distribution, release, and exhibition of the motion picture entitled "So's Your Uncle"; and the court further erred in denying said defendant's motion to strike such evidence so admitted over his said objections.

18. The court erred in refusing to permit defendant Bruckman to offer evidence that plaintiff came into court with unclean hands in refusing to receive the evidence

contained in said defendant's offer of proof made in that behalf.

19. The court's judgment is contrary to law because it was based upon a conversation or conversations between the judge of said court and third persons, which conversation or conversations were not offered or received in evidence.

Defendant Bruckman designates the parts of the record which he thinks necessary for the consideration of this appeal as follows:

(Page references in each instance, except the reporter's transcript, are to the record certified by the Clerk of the District Court.)

1. Plaintiff's complaint. (Beginning at page 2.)
2. Answer of defendant Universal Pictures Company, Inc. (Beginning at page 19.)
3. Answer of defendant Clyde Bruckman. (Beginning at page 25.)
4. Plaintiff's waiver of jury trial. (Beginning at page 31.)
5. Defendants' motion to dismiss and the order of the District Court ruling thereon. (Beginning at page 8; beginning at page 12.)
6. Reporter's stenographic transcript of all the testimony taken and proceedings had at the trial in the District Court, and reporter's stenographic transcript of the proceedings had in the District Court on December 17, 1945. (Pages 1-565.)

7. All of plaintiff's exhibits and all of defendants' exhibits offered or received in evidence at the trial in the District Court.

(The trial court having made an order for the certification of all of the exhibits to the appellate court, it is intended that only Plaintiff's Exhibits 1 and 2 and Defendants' Exhibits B, G, H and I shall be printed, it being impossible or impracticable to print the remaining exhibits.)

8. Defendants' motion to strike evidence. (Beginning at page 160a.)

9. Findings of Fact and Conclusions of Law and the Judgment of the District Court entered on January 8, 1946. (Beginning at page 189.)

10. Notice of Appeal. (Beginning at page 200.)

11. Supersedeas and cost bond. (Beginning at page 201.)

12. Designation of record by defendants in District Court. (Beginning at page 203.)

13. Stipulations in District Court relating to record on appeal. (Beginning at page 210; beginning at page 212; beginning at page 219.)

14. Order extending time to April 1, 1946, in which to file and docket appeal of defendants. (Beginning at page 221.)

15. Certificate of Clerk of District Court.

(With the exception of plaintiff's complaint and the final judgment, in all of the foregoing documents the captions, verifications and proofs of service are to be omitted. In place of captions, verifications, and other omitted matter, the words "Caption", "Duly verified", or other suitable words shall be substituted at the proper places.)

By this designation defendant Bruckman intends to refer to the complete record of the proceedings on the before mentioned motion to dismiss and to all the proceedings and evidence relating to the trial of said action.

Dated March 27, 1946.

LEWINSON & ARMSTRONG and
JOSEPH L. LEWINSON

By Joseph L. Lewinson

Attorneys for Appellant Clyde Bruckman

Service acknowledged March 27, 1946. Harold A. Fendler, Attorney for Appellee.

[Endorsed]: Filed Mar. 28, 1946. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

APPELLANT UNIVERSAL PICTURES COMPANY, INC.'S STATEMENT OF POINTS TO BE RELIED UPON ON APPEAL AND DESIGNATION OF RECORD NECESSARY FOR THE CONSIDERATION THEREOF.

The appellant Universal Pictures Company, Inc. states that the following are the points upon which it intends to rely on the appeal in this action, with the designation of the parts of the record which it thinks necessary for the consideration thereof:

1. The alleged infringing incidents are not a material and substantial part of plaintiff's work, playing a role of consequence therein.
2. Such incidents considered independently from the story of plaintiff's work, are commonplace and incapable of copyright protection.
3. Such incidents are not an integral part of the general theme, story or plot of plaintiff's work, but are unrelated and independent comedy accretions comprising gags and stage business.
4. Such incidents are not a structural sequence of plaintiff's story.
5. No part of plaintiff's story has been appropriated.
6. Such incidents are comic accretions to plaintiff's story and not intrinsic to its development.
7. The alleged infringing material consists of only humorous incidents, gags, and comedy and stage business, readily derivable from the public domain, and not subject to copyright protection.

8. The theme and story of the two works are radically dissimilar in plot, action, treatment, development and characterization.

9. Such incidents have no functional relationship whatsoever to the development of the story of plaintiff's work.

10. Such incidents are not essential to the story of either plaintiff's or defendant's work.

11. Such incidents are so insubstantial and so unimportant to the essential structure of plaintiff's work that their appropriation cannot support a claim of copyright infringement.

12. There was no proof of any damages sustained by plaintiff.

13. The question is not what speculatively plaintiff may have lost, but what actually it did lose.

14. Plaintiff's damages being incapable of reasonable ascertainment and not susceptible of proof, were not the subject of recovery.

15. The damages were not based on relevant data, but on mere speculation and guesswork.

16. The only evidence adduced to support the award of damages, are the conjectures and unwarranted estimates of plaintiff's witnesses, instead of the proof of actual damages, established by facts from which their existence may be logically and legally inferable.

17. The award of damages is unsupported by the proof of any facts from which the amount thereof could legally or logically be inferred.

18. The opinions of plaintiff's witnesses as to the amount of damage suffered by plaintiff should have been

excluded, as there was no certain basis of fact upon which their opinions could be based.

19. The award of damages was based entirely upon the speculations and conjectures of plaintiff's witnesses, without the knowledge of any facts from which a reasonably accurate estimate could be made.

20. The award of damages was based upon the erroneous assumption that the evidence established there was an open market for reissue and remake rights to old motion pictures, while the evidence established that such properties had no established or fixed market value by which the damages could be determined.

21. There was no evidence to support the Court's determination that the value of plaintiff's motion picture was decreased to the extent of \$40,000.00 by reason of the alleged infringement.

22. The evidence having established that there was no public demand or market for the reissue or remake rights to plaintiff's motion picture, plaintiff sustained no damage.

23. Plaintiff's witnesses were permitted to give their opinion of the damages suffered by plaintiff, although none of such witnesses *was* qualified or in a position to give an opinion as to the value or decrease in value of the reissue or remake rights to plaintiff's motion picture.

24. As plaintiff's motion picture did not have any reissue or remake value, plaintiff did not suffer any damage.

25. The Court admitted the testimony of plaintiff's witnesses as to the damages suffered by plaintiff, upon the erroneous assumption that in *Sheldon v. Metro Pictures Corp.*, 309 U. S. 390, the Court had recognized

the right to prove such damages by the mere opinion of expert witnesses.

26. The Court having determined that regardless of any additional testimony that might be offered, it would follow the rule of law of *Sheldon v. Metro Pictures Corp.*, supra, in allocating 20% of the profits of defendant's motion picture to plaintiff, defendant did not introduce evidence that was available to it and that would have otherwise been offered.

27. The Court made its award of damages upon the erroneous assumption that while it must follow the rule of law of *Sheldon v. Metro Pictures Corp.*, supra, in allocating 20% of the profits of defendant's motion picture to plaintiff, if it felt this was not sufficient, it could arbitrarily add such amount as it deemed essential to compensate plaintiff for the damages it suffered.

28. The Court made its award of damages upon the erroneous assumption that such damages are determined in the same manner as in a personal injury case, by reashing out and picking some figure from the air or the sky, and that is the damages, and that is all there is to it.

29. The Court erred in holding that plaintiff's damages could be fixed entirely by expert opinion as to value unsupported by any facts, on the same basis as real estate or other property.

30. The Court erred in holding that plaintiff's damages could only be established by expert opinion.

31. The Court erred in holding that Harold Lloyd, the president of plaintiff, was defendant's witness, and that defendant was bound by his testimony.

32. The Court erred in holding that defendant could not contradict or impeach Harold Lloyd, the president of plaintiff, and in sustaining objections upon such ground to the interrogatories of said witness by defendant as to material and relevant matter, and in refusing upon such ground to admit proof offered by defendant as to material and relevant matters.

33. The Court erred in basing the damages sustained by plaintiff upon the testimony of plaintiff's witnesses as to the profits that plaintiff might make if it ever should reissue or remake plaintiff's motion picture, or the profits that some other motion picture producer might make if it ever should purchase such rights from plaintiff.

34. The Court erred in basing the damages sustained by plaintiff upon the testimony of plaintiff's witnesses as to the moneys paid by other motion picture producers for the motion picture rights to famous stage plays and literary works.

35. The parties having stipulated that the profits derived by defendant from its motion picture were in the sum of \$20,517.28, the award to plaintiff should have been limited to the portion thereof attributable to the use by defendant of the incidents in plaintiff's motion picture, and should not have been augmented by any additional sum which in the opinion of the Court should be added to such portion of the profits, so as to increase the damages to the arbitrary sum of \$40,000.

36. The evidence having established that the motion picture produced by Columbia Pictures Corporation entitled "Loco Boy Makes Good", and containing substantially the same incidents, was previously exhibited to a greater extent in the United States than defendant's mo-

tion picture, and in the same locale and type of theaters, plaintiff could not have sustained damages in the sum of \$40,000.00 through the subsequent exhibition of defendant's motion picture.

37. The Court erred in sustaining objections to the testimony offered by defendant of its witness George A. Hirliman, after plaintiff's witness Harold Lloyd denied that any of plaintiff's motion pictures had ever been re-issued, and in refusing to admit the testimony of said witness, that his company had purchased the reissue rights to one of plaintiff's motion pictures starring Harold Lloyd, for which it had only paid the sum of \$3,500.00, and there being no public demand for the reissue or remake rights to any of plaintiff's motion pictures starring Harold Lloyd, that no motion picture exhibitor would buy or license such motion picture, by reason of which the contract with his company was mutually cancelled and the purchase price refunded to his company, which nevertheless sustained a loss of \$1,000.00 through the transaction; although the Court admitted plaintiff's testimony as to the price paid for such rights to motion pictures based upon famous stage plays and literary works which were in no way comparable to plaintiff's motion picture.

38. The only material evidence in the record established that even if plaintiff had offered any evidence to show that it had sustained damage, the amount of such damage would have been nominal.

39. In view of the unsound theory of law advanced by plaintiff for the recovery of damages, there should be no award of counsel fees, the amount of which in any event would be entirely disproportionate to the portion of the profits which should be awarded plaintiff if it is de-

terminated that there is any liability of defendant to plaintiff.

40. Plaintiff having stipulated that upon receipt of the first communication from plaintiff asserting its alleged claim, defendant sent out instructions to all of its distribution exchanges to stop the exhibition of defendant's motion picture, and that such instructions were complied with, and it appearing from the evidence that defendant was not aware that it was infringing a copyrighted work, and that such infringements could not reasonably have been foreseen, the entire sum of damages recoverable by plaintiff should not in any event exceed the sum of \$5,000.00.

41. The evidence is insufficient to support any claim upon which plaintiff is entitled to relief.

Appellant Universal Pictures Company, Inc. designates the following as the parts of the record which it thinks necessary for the consideration of the points upon which it intends to rely, namely:

(Page references are to the original certified record filed in this court.)

	Page
(1) Complaint for damages and other relief from copyright infringement.....	2
(2) Motions of Clyde Bruckman to dismiss, to make certain, or for bill of particulars and to strike.....	8
(3) Motions of Universal Pictures Company, Inc. to dismiss, to make certain or for bill of particulars and to strike.....	12
(4) Minute order made May 14, 1945.....	16

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(5) Answer of defendant Universal Pictures Company, Inc.....	19
(6) Answer of defendant Clyde Bruckman.....	25
(7) Waiver of jury trial.....	31
(8) Reporter's stenographic transcript of the testimony taken and proceedings had at the trial in the District Court, and reporter's stenographic transcript of the proceedings had in the District Court on December 17, 1945.....(Rep. Trans.) 1 to 565	
(9) Appellant Universal Pictures Company, Inc. designates the following as the exhibits which it desires printed in the records:	
Defendants' Exhibit G—Letter 3/20 to Blumber, page 406, Reporter's Transcript, following line 12.	
Defendants' Exhibit H—Deposition of G. Josephs, page 407, Reporter's Transcript, following line 10.	
Defendants' Exhibit I—Tabulation figures "So's Your Uncle", page 504, following line 17.	
The trial court has made an order that all of the exhibits offered or received in evidence shall be certified to the Appellate Court and the motion picture films entitled "Movie Crazy" (Plaintiff's Exhibit 3), "So's Your Uncle" (Defendants' Exhibit "D"), and "Loco Boy Makes Good"	

(Defendants' Exhibit "E") will be delivered to the Marshal as provided in Rule 18.

(10) Motion to strike.....	160a
(11) Findings of Fact and Conclusions of Law	189
(12) Final Judgment	197
(13) Notice of Appeal.....	200
(14) Supersedeas Bond on Appeal.....	201
(15) Stipulation and Order re Exhibits.....	210
(16) Stipulation and Order re Reporter's Transcript	212
(17) Stipulation and Order Extending Time to Docket Appeal.....	221
(18) Stipulation re Record on Appeal.....	223
(19) Certificate of Clerk of District Court.....	—

While specific reference is made to particular parts of the record, appellant Universal Pictures Company, Inc. desires that there shall be printed the complete record of all the pleadings, proceedings had and evidence taken or offered in the trial court as necessary for the proper consideration of the points upon which it relies.

Dated: April 1, 1946.

JULIAN T. ABELES

MITCHELL, SILBERBERG & KNUPP and
GUY KNUPP

By Guy Knupp

Attorneys for Appellant Universal Pictures
Company, Inc.

Service acknowledged April 1, 1946. Harold A. Fendler, Attorney for Appellee.

[Endorsed]: Filed Apr. 2, 1946. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and cause.]

CROSS-APPELLANT HAROLD LLOYD CORPORATION'S STATEMENT OF POINTS TO BE RELIED UPON ON CROSS-APPEAL AND DESIGNATION OF RECORD NECESSARY FOR THE CONSIDERATION THEREOF.

In accordance with Subdivision 6 of Rule 19 of the United States Circuit Court of Appeals for the Ninth Circuit, appellee and cross-appellant Harold Lloyd Corporation (hereinafter sometimes referred to as plaintiff), hereby states that the points on which it intends to rely upon its cross-appeal to the above entitled Court are as follows:

1. The judgment for damages is inadequate.
2. The District Court erred in finding that the extent to which plaintiff had been damaged by defendant's infringements did not and does not exceed the sum of \$40,000.
3. The evidence shows that plaintiff was entitled to actual damages sustained by reason of defendants' infringements upon plaintiff's copyright in the sum of \$250,000 or more.
4. The District Court erred in sustaining defendants' objections to plaintiff's offer of proof relating to the value of reissue and remake rights in and to motion picture photoplays starring Harold Lloyd.

5. The District Court erred in overruling plaintiff's objections to proof offered by defendants relating to the value of reissue and remake rights of motion pictures.

6. The District Court erred in failing and refusing to award to plaintiff statutory damages in the sum of \$250,000 or more, under and pursuant to the provision of Sec. 25, subdivision (b) of the Copyright Act of March 4, 1909, as amended.

7. The District Court erred in failing and refusing to award to the plaintiff all of the profits derived by the defendant Universal Pictures Company, Inc. from the production and distribution of the motion picture photoplay entitled "So's Your Uncle".

8. The District Court erred in finding that the profits received and derived by defendant Universal Pictures Company from infringements upon plaintiff's copyright was and is 20% and no more of the total profits realized and derived by said defendant from the production and distribution of the motion picture photoplay entitled "So's Your Uncle". Said finding is without support in the evidence and there is no proper or competent evidence which supports a partial allocation of defendants' profits to infringements upon plaintiff's copyright.

DESIGNATION OF RECORD ON CROSS-APPEAL

Cross-appellant Harold Lloyd Corporation designates the following parts and portions of the record in addition to the record heretofore designated by appellants Universal Pictures Company, Inc. and Clyde Bruckman as necessary for the consideration of this cross-appeal as follows, to wit:

- (1) Notice of cross-appeal (beginning at page 209 of the record, certified by the Clerk of the District Court).
- (2) Cost bond on cross-appeal (page 214, *supra*).
- (3) Plaintiff's offer of proof (page 161, *supra*).
- (4) Stipulation re record on appeal (page 223, *supra*).

Dated April 1, 1946.

HAROLD A. FENDLER

Attorney for Cross-Appellant Harold Lloyd Corporation.

Service of the foregoing is hereby acknowledged this 1st day of April, 1946. Lewinson & Armstrong and Joseph L. Lewinson, by Joseph L. Lewinson by W. F., Attorneys for Cross-Appellee Clyde Bruckman; Mitchell, Silberberg & Knupp, by Guy Knupp by E. R., Attorneys for Cross-Appellee Universal Pictures Company, Inc.

[Endorsed]: Filed Apr. 6, 1946. Paul P. O'Brien, Clerk.

No. 11286

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

UNIVERSAL PICTURES COMPANY, INC., a Delaware Corporation, and CLYDE BRUCKMAN,

Appellants,

vs.

HAROLD LLOYD CORPORATION, a California corporation,

Appellee.

HAROLD LLOYD CORPORATION, a California corporation,

Appellant,

vs.

UNIVERSAL PICTURES COMPANY, INC., a Delaware Corporation and CLYDE BRUCKMAN,

Appellees.

OPENING BRIEF FOR CROSS-APPELLANT
HAROLD LLOYD CORPORATION UPON
ITS CROSS-APPEAL.

HAROLD A. FENDLER,

711 Citizens National Bank Building, Los Angeles 13,
Attorney for Cross-Appellant and Appellee Harold Lloyd Corporation.

FILED

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Appellees.

OPENING BRIEF FOR CROSS-APPELLANT
HAROLD LLOYD CORPORATION UPON
ITS CROSS-APPEAL.

To the Honorable the Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Statement of Pleadings and Jurisdictional Facts.

The plaintiff Harold Lloyd Corporation (Appellee and Cross-Appellant) filed its complaint against defendants Universal Pictures Company, Inc. and Clyde Bruckman (Appellants and Cross-Appellees) in the United States District Court, for damages and injunctive and other relief arising from infringements by defendants upon plaintiff's copyrighted motion picture photoplay entitled "MOVIE CRAZY" [Tr. pp. 2-7].

Defendants' answers denied infringement but admitted production and distribution of the alleged infringing motion picture photoplay entitled "So's YOUR UNCLE" [Tr. pp. 17-26].

Jurisdiction of the Federal Courts was and is invoked under the provisions of Section 34 of the Copyright Act of 1909 (March 4, 1909, Chap. 320, Sec. 34, 35 Stats. 1084). See also Section 25, (a) and (b), 35 Stats. 1081, March 4, 1909, Chap. 320; Aug. 24, 1912, Chap. 356, 37 Stats. 489.

Statement of the Case.

During the years 1931 and 1932 cross-appellant Harold Lloyd Corporation (hereinafter referred to as plaintiff) produced a motion picture photoplay entitled "MOVIE CRAZY" starring Harold Lloyd and costing in excess of \$650,000 [Finding of Fact V, Tr. p. 33].

This motion picture photoplay was on September 15, 1932 duly copyrighted in the United States by the plaintiff which at all times since has retained its sole ownership thereof [Finding of Fact VI, Tr. p. 33].

During the course of this production the plaintiff Harold Lloyd Corporation employed the individual defendant

Clyde Bruckman as one of the writers and directors of its motion picture "MOVIE CRAZY" and paid Bruckman \$42,900 for his services [Finding of Fact IV, Tr. p. 33]. Bruckman thus acquired full knowledge of the contents of plaintiff's motion picture. Twelve years later, and during the year 1943, the individual defendant Bruckman was employed by his co-defendant Universal Pictures Company, Inc. as a writer to assist in the preparation of defendant's infringing motion picture photoplay entitled "So's YOUR UNCLE"; in which photoplay the defendants knowingly, wilfully, and deliberately incorporated a sequence of fifty or more consecutive scenes bodily copied and misappropriated by them from the plaintiff's motion picture "MOVIE CRAZY" [Finding of Fact VII, Tr. p. 34].

Defendants' motion picture was exhibited in more than 5,000 theaters located throughout the United States in deliberate violation of the plaintiff's rights and after full information of the misappropriation had been given to Jean Yarbrough, the individual producer placed by the defendant Universal Pictures Company, Inc. in charge of the production of its infringing motion picture [Findings of Fact VII and VIII, Tr. pp. 35, 36].

The trial Court found that plaintiff's damages, by reason of the infringements, aggregated \$40,000, for which amount judgment was awarded against both the defendants Bruckman and Universal Pictures Company, Inc. [Findings of Fact IX and X, Tr. pp. 35, 36; Conclusion III, Tr. p. 39; Judgment, Tr. p. 42].

The trial Court further found that the total amount of profits realized and derived by the defendant Universal Pictures Company, Inc. from distribution of the infring-

ing motion picture photoplay “exceeds \$20,500” but that only 20% of such profits were derived from infringements upon plaintiff’s copyright [Finding of Fact XII, Tr. p. 36]; but that the plaintiff was not entitled to judgment awarding any part of the profits “by reason of the fact that the actual damages suffered by plaintiff due to said copyright infringements exceeds the aggregate sum of profits made, received and derived by said defendant from such copyright infringements” [Conclusion of Law IV, Tr. p. 39].

The plaintiff appeals from the judgment upon the ground that the actual damages found by the trial Court were and are wholly inadequate; furthermore that there was no evidence to support an apportionment of profits and in the absence of any evidence with respect thereto, that plaintiff was entitled to an award of the whole thereof in addition to damages; or in the alternative that plaintiff was entitled to an award of statutory damages of at least \$250,000 “in lieu of actual damages and profits”.

The primary question to be determined upon this appeal is the nature, scope and extent of relief which could and should be awarded for infringement of plaintiff’s copyright.

The plaintiff contends that the Copyright Act expressly authorizes recovery of “such damages as the copyright proprietor may have suffered due to the infringement *as well as all the profits* which the infringer shall have made from such infringement. . . . Or in lieu of actual damages and profits, such damages as to the court shall appear to be just” (Section 25(b), 35 Stat. 1081, March 4, 1909, Chap. 320).

Defendants contend that plaintiff is not entitled to recover any profits since plaintiff's damages exceed the profits allocable to the copyright infringements; and that in no event is a court justified in awarding such statutory damages as it deems just if there is any competent proof of *either* damages *or* profits attributable to the infringements.

Plaintiff's reply to defendants' contentions is that they violate the express provisions of the Copyright Statute and deprive the Court of the very authority heretofore exercised by this Court in such cases as *Turner & Dahlen v. Crowley*, 252 Fed. 749 (C. C. A. 9).

Specification of Errors Relied Upon.

Cross-Appellant Harold Lloyd Corporation relies upon the following specification of errors which it intends to urge upon this cross-appeal:

1. *The District Court erred in rendering a judgment for inadequate damages and in finding that the extent to which plaintiff had been damaged by defendants' infringements, did not and does not exceed the sum of \$40,000 [Findings of Fact IX, X, Tr. pp. 35, 36; Conclusion 3, Tr. p. 39; Judgment, Tr. p. 42].*

In this respect plaintiff will contend that the only competent evidence received by the trial Court would have sustained and did require a judgment for actual damages of \$250,000 or more [see Cross-Appellant's Statement of Points numbered I, II, III, Tr. p. 542].

2. *The District Court erred in finding that profits derived by the defendant Universal Pictures Company, Inc. from infringements upon plaintiff's copyright was and is 20% and no more of the total profits derived from*

distribution of the infringing motion picture photoplay and the District Court further erred in failing and refusing to award to the plaintiff all of the profits derived from the production and distribution of such motion picture photoplay [Cross-Appellant's Statement of Points VII and VIII, Tr. p. 543].

In this respect plaintiff contends that the finding allocating 20% of the profits [Finding of Fact XII, Tr. p. 36] is wholly without support in the evidence and that the trial court's conclusion [Conclusion IV, Tr. p. 39] that no profits derived from the copyright infringements may be awarded where actual damages exceed such profits, is contrary to law and contrary to the express wording of the Copyright Statute.

3. *That plaintiff was entitled to a minimum award of \$250,000 as statutory damages in lieu of actual damages and profits if there be any doubt as to the competency of plaintiff's evidence respecting its actual damages [Cross-Appellant's Statement of Points VI, Tr. p. 543].*

4. *The District Court erred in sustaining defendants' objections to plaintiff's offer of proof relating to the value of reissue and remake rights in comparable sound and talking motion pictures starring Harold Lloyd [Cross-Appellant's Statement of Points IV, Tr. p. 542],*

Plaintiff's written offer of proof filed at the direction of the Court appears in the Transcript pages 29-31, and (omitting a portion of said offer not relied upon or urged upon this appeal) reads as follows:

“Now comes plaintiff Harold Lloyd Corporation and pursuant to direction of the Court to file its Offer of Proof in writing, hereby offers to prove the following facts and each of them severally as a

part of the evidence offered at the trial on behalf of the plaintiff, to-wit:

“1. That on or about March 14, 1945 Samuel Goldwyn purchased from Paramount Pictures Inc. for the sum of \$125,000 in cash, the ‘remake’ rights of the motion picture starring Harold Lloyd entitled ‘THE MILKY WAY’.

“2. That as additional consideration for the sale and transfer of said remake rights in the motion picture ‘THE MILKY WAY’ Paramount Pictures Inc. received from Samuel Goldwyn the ‘loan-out’ of the services of Teresa Wright, an outstanding motion picture star, upon payment of said star’s regular salary without bonus, premium or additional compensation, to Samuel Goldwyn, although such additional bonus, payment or compensation is customary and usual in the motion picture industry where an outstanding star is under exclusive contract to one producer and her services are ‘loaned out’ to another producer for a single motion picture production.

“3. That said motion picture ‘THE MILKY WAY’ starring Harold Lloyd was not a financial success when originally produced and distributed in 1936 by Paramount Pictures Inc. and said motion picture failed to recoup its negative cost although said motion picture was a ‘sound and talking’ motion picture comparable in story and production value to ‘Movie Crazy’ excepting only that it lacked an outstanding comedy sequence such as the ‘magician’s coat’ sequence in ‘Movie Crazy’.

“Said offers of proof and each of them are made upon the following grounds and each of them:

“1. In rebuttal of evidence offered and received on behalf of the defendants, and for the express purpose of disproving, contradicting, and rebutting defendants’ testimony that the reissue and remake rights in comparable comedy motion pictures produced by or starring Harold Lloyd were ‘negligible’ or of ‘no value’ during the year 1945.

“2. For the further purpose of corroborating and explaining the testimony of plaintiff’s witnesses Lloyd, Landau, Bentel and Botsford and for the further purpose of enabling said expert witnesses to include the facts above stated in their reasons for testifying that reissue and remake rights of motion pictures starring Harold Lloyd have substantial monetary value regardless of the lapse of ten or more years since their initial production, release and distribution.

Respectfully submitted,

HAROLD A. FENDLER,

[Tr. pp. 29-31.]

Attorney for Plaintiff.”

On December 17, 1945 plaintiff’s counsel stated to the Court with respect to the foregoing offer of proof:

“There is an offer of proof which your Honor directed to be filed in writing,”

to which the Court replied:

“That will be deemed filed. For the reasons heretofore stated, the evidence has been rejected” [Tr. p. 492].

The Court's direction to file a written offer of proof was made on November 16, 1945, during the direct examination of A. M. Botsford, as follows:

"Q. By Mr. Fendler: Are you able, Mr. Botsford, to compare the Harold Lloyd talking motion picture of 'Movie Crazy' and 'Milky Way' with respect to story value, cost, success and profits?

Mr. Abeles: I object to that, if the court please.

The Court: Objection sustained.

Mr. Fendler: May I make an offer of proof?

The Court: You may submit your offer in writing at a later time."

Previously a verbal offer of proof had been made:

"Mr. Fendler: If your Honor please, we subpoenaed a witness, the general manager of the Samuel Goldwyn Pictures Corporation. Counsel for Universal has denied that the sale price of the re-make rights of 'Milky Way' was \$125,000. Mr. Selvin, who represents Samuel Goldwyn, asked me whether I would be willing to have this witness disregard the subpoena if he brought the original contracts to court at which time the defendants might desire to object upon the ground that the evidence of the payment of \$125,000 for the re-make rights was immaterial and incompetent, upon which the court would rule, and if the court overruled the objection, then in such event the fact would be received in evidence just as if the witness testified to it here in person. Is that the understanding, Mr. Selvin?

Mr. Abeles: Wait a minute, Mr. Selvin.

Mr. Herman Selvin: If I may state to the court, the position that I took with Mr. Fendler and with counsel for the defendants also—I am perfectly

willing to produce and have the contracts in question. I do not desire that they be made public property unless they be ruled competent and relevant to the issue in this case. Whether they are or not, I don't now. I have nothing to do with that. If they are ruled to be admissible the contracts are here and I am sure that the parties could agree that they are correct copies of the contracts without the presence of Mr. Ezzell.

Mr. Fendler: That is the understanding, your Honor, so we submit it to your honor for your ruling.

The Court: Counsel, what another picture sold for in my opinion is not admissible."

Plaintiff's production of the evidence in court was the result of a motion to strike previously granted by the Court with respect to testimony elicited from Harold Lloyd, who made the following answer when the trial Court asked the following question [Tr. pp. 367, 368]:

"The Court: * * * And in addition to that other studios will buy from a studio pictures that have been produced in the past, is that correct?

The Witness: Oh, yes, they buy the story, remake it sometime. For instance, 'Milky Way' at the present time is a picture that I starred in and had a 50 per cent interest in. That particular picture sold to Samuel Goldwyn. I think it was sold for around \$125,000."

During Mr. Lloyd's previous examination on the witness stand the following had taken place [Tr. pp. 107-109]:

"Q. By Mr. Fendler: Do you have knowledge as to the prices which have currently been paid for

re-makes and the prices currently received from re-issues of pictures previously made, either silent or talkies? Do you have knowledge on that subject?

A. Are you talking about stage plays also?

Q. Well, particularly knowledge of re-makes of pictures and re-issues of pictures—just yes or no. A. Yes.

Q. Will you state to the court what that knowledge consists of?

Mr. Lewinson: That is objected to on the grounds it is irrelevant, immaterial and incompetent.

The Court: What is the purpose of the question?

Mr. Lewinson: No foundation laid.

Mr. Fendler: We desire to show, if your Honor please, that the figures which have been given by the witness are not pulled down from the air at all, but that re-make rights and re-issue rights are currently being sold for figures upwards of one and two hundred thousand dollars. We desire to show, for example, that the re-make rights of one picture—

The Court: Well, counsel, the trouble with that evidence is this: When you do that, then the whole picture is involved. Whenever you start to compare one picture with another you are getting into a pretty deep subject. I think that you go far enough with this witness when he testifies that they have a market value, you might say, either a story to be sold to others or to re-make them or re-vamp them and re-issue them. As far as that is concerned, as soon as you start to say that this picture might be compared, or, to use the example, certain other pictures, he naturally, in his own mind, would have to base it upon other pictures that he has known to have brought in those values. And then it comes to a

question of comparative value of pictures and the merits or demerits of the various pictures. And I think you are getting far afield. We never would end in that respect. You would have the court out there for the next two weeks looking at the various pictures.

Mr. Fendler: May I state this, your Honor, in order that our position will be clear on it? Of course, it is much easier when you compare the value of a Packard with a Cadillac automobile, although the two automobiles are quite different.

However, in the picture business people who are qualified to judge can say generally that 'A' pictures which had a production cost of \$500,000 to \$1,000,000 and have grossed from a million and a half to four million dollars fall within a certain general bracket; and that re-make rights or the re-issue rights of these pictures that have literally grossed millions have a definite market value, possibly not to the penny, but nevertheless, to a point where an approximation can be made which would be of some assistance to this court.

I might say the authorities that we propose to offer in connection with damages say very frankly that where the defendants' wrong has inflicted damage and it is difficult of ascertainment, that it does not lie in the mouth of the defendants to complain that we cannot set a value to a nickel. But what we do propose to show, from people well known in the industry, is that the re-issue and re-make rights of a Lloyd picture which costs, we will show, \$650,000 to produce and grossed a million and a half upon [at]

the bottom of the depression has a re-make right and a re-issue right in the value—that is, it did have before ‘So’s YOUR UNCLE’ was produced—in the amount stated by Mr. Lloyd or more. That is our case.

The Court: All right. He has testified to every one of those things, counsel. He has testified as to what he considers the difference in the value of his film before and after the release of ‘So’s YOUR UNCLE’, and this other is in a sense cumulative. He has testified to his experience and the part he played in the motion picture industry. He has testified as to his knowledge. As quick as we go into that we start comparing pictures. Presume, for instance, that one they started to show yesterday afternoon by mistake, we would have to determine whether it was a picture like that or it was a picture like ‘So’s YOUR UNCLE’ or ‘MOVIE CRAZY’ from the pictures themselves.

Mr. Fendler: That was the reason that I was attempting to confine it.

The Court: Some pictures click. We recognize that on some pictures there has been a lot of money spent which have not clicked. There is an element of risk in the industry and they all recognize it.

Mr. Fendler: We were going to confine our evidence to pictures in the bracket and in the class of Mr. Lloyd’s. But if your Honor feels that it is improper, I have made my offer and I feel that it is competent, but I do not want to argue it any further.”

Summary of Argument.

POINT I: THE JUDGMENT FOR DAMAGES IS INADEQUATE.

(A) PLAINTIFF'S EVIDENCE OF GENERAL DAMAGES.

(B) PLAINTIFF'S EVIDENCE OF SPECIAL DAMAGE CONSISTING OF IMPAIRMENT AND DESTRUCTION OF VALUE OF REISSUE AND REMAKE RIGHTS OF PLAINTIFF'S COPYRIGHTED MOTION PICTURE.

(C) THE PREJUDICIAL ATTITUDE OF THE TRIAL COURT TOWARDS THE AMOUNT OF DAMAGES SUSTAINED BY PLAINTIFF.

POINT II: THE TRIAL COURT ERRED IN APPORTIONING TWENTY PER CENT OF DEFENDANTS' PROFITS TO THEIR COPYRIGHT INFRINGEMENTS AND IN REFUSING TO AWARD ANY PROFITS TO THE PLAINTIFF UPON THE GROUND THAT PLAINTIFF'S DAMAGES EXCEEDED DEFENDANTS' PROFITS.

(A) THERE WAS NO EVIDENCE TO SUSTAIN THE ARBITRARY ALLOCATION BY THE TRIAL COURT OF 20 PER CENT OF DEFENDANTS' PROFITS TO THEIR COPYRIGHT INFRINGEMENTS.

(B) THE COURT ERRED IN REFUSING TO AWARD ANY PROFITS TO THE PLAINTIFF.

POINT III: WHERE DAMAGES AS WELL AS PROFITS ARE DIFFICULT OF ASCERTAINMENT THE COURT SHOULD AWARD STATUTORY DAMAGES IN SUCH SUM AS SHALL APPEAR TO BE JUST (BEARING IN MIND THAT THE STATUTORY SCHEDULE OF \$100 FOR THE FIRST INFRINGING PERFORMANCE AND \$50 FOR EACH SUBSEQUENT INFRINGING PERFORMANCE, IS BY STATUTE EXPRESSLY "NOT TO BE REGARDED AS A PENALTY").

ARGUMENT.

POINT I.

The Judgment for Damages Is Inadequate.

The trial court rendered judgment in favor of plaintiff Harold Lloyd Corporation for \$40,000 damages and made specific findings of fact [Finding IX, Tr. p. 35] that by reason of defendants' infringements "plaintiff has been damaged by defendants and each of them in the sum of \$40,000."

The Court further found "that plaintiff's rights to re-issue and remake plaintiff's motion picture photoplay "MOVIE CRAZY" were substantially damaged and impaired by reason of said infringing acts of defendants but that the extent to which said rights were impaired and damaged did not and does not exceed the sum of \$40,000" [Finding X, Tr. p. 36].

Plaintiff had pleaded in its complaint *general* damages of \$200,000 [Complaint, Para. X, Tr. p. 5] and *special* damages of \$200,000 resulting from destruction of the value of plaintiff's rights to reissue and remake its copyrighted motion picture [Complaint, Para. XI, Tr. p. 5].

A. PLAINTIFF'S EVIDENCE OF GENERAL DAMAGE.

In support of its claims to general damages, the trial court received evidence that plaintiff's motion picture had cost \$652,853.86 to produce [Tr. p. 175] and \$414,010.14 to distribute [Tr. p. 176]; that it had taken the plaintiff twenty-one months to produce such motion picture, from October, 1930, until July, 1932, and that eleven writers had been employed thereon at a total cost of \$66,373.67 [Plaintiff's Ex. 2, Tr. p. 174].

Further evidence was received that the gross amount received from distribution was \$1,439,182.21 leaving a net profit of nearly \$400,000, although the motion picture was released when this country was at the bottom of the depression period (*e.g.*, 1932, 1933).

Plaintiff's motion picture photoplay was released in more than fifty countries throughout the world [Tr. p. 184] and the particular sequence misappropriated by defendants was estimated to have cost the Harold Lloyd Corporation approximately \$188,000 [Tr. p. 180].

A stipulation was entered into between counsel that defendants' infringing motion picture "So's YOUR UNCLE" was exhibited in 6636 theaters throughout the United States [Tr. p. 90].

It was also stipulated that the records of the Southern California branch of the Universal Film Exchange (a subsidiary distributing corporation wholly owned by Universal Pictures Company Inc.) reflected the fact that in Southern California 248 theaters exhibited the defendants' infringing picture on 566 play dates [Tr. p. 90].

The significance of these stipulations was stated by plaintiff's counsel at the trial as follows [Tr. p. 169]:

"There is in evidence a stipulation of 6,636 theaters. The evidence here in California, from the Southern California Exchange, shows a ratio of 2.28 playing dates to each theater. If that measure be applied to the 6,636 theaters there will be in excess of 15,000 playing dates; and the court will take judicial notice that the playing dates include anywhere from two to four performances. In other words, if it is on a Saturday or Sunday, there are four per-

formances; if it is just in the evening, it is two performances.

“So we actually have the evidence before Your Honor to establish 30,000 or more infringing performances on the basis of the stipulations in evidence.”

It is plaintiff's contention that general damages might properly be found by a court predicated upon evidence of the nature and value of plaintiff's property; the scope and extent of its misappropriation, and proof of the number of infringing performances in theaters in which the plaintiff's property has been used without its consent. (See *United States Frumentum Co. v. Lauhoff*, 6th C. C. A., 216 Fed. 610, at page 617, where “general damages” are expressly defined as “damage not resting on any of the applicable, exact methods of computation but upon facts and circumstances which permit the jury or the court to estimate in a general, but in a sufficiently accurate way the injury to plaintiff caused by each infringing sale.”)

By analogy in *Sinclair Refining Co. v. Jenkins*, 289 U. S. 689, Mr. Justice Cardozo wrote a unanimous opinion for the U. S. Supreme Court expressly holding a patent to be a “thing unique” and that the absence of a ready market or market price or the difficulties in proving value do not relieve an infringer from liability for damages; the Court stating at page 697:

“This is not a case where the recovery can be measured by the current prices of a market. A patent is a thing unique. There can be no contemporaneous sale to express the market value of an invention that derives from its novelty its patentable quality. Cf. *United States v. Swift & Co.*, 270 U. S. 124;

Todd v. Gamble, 148 N. Y. 382; 42 N. E. 982. But the absence of market value does not mean that the offender shall go quit of liability altogether. The law will make the best appraisal that it can, summoning to its services whatever aids it can command. *United States v. Swift & Co.*, *supra*; *U. S. Frumentum Co. v. Lauhoff*, 216 Fed. 610; *Industrial & General Trust, Ltd. v. Tod*, 180 N. Y. 215, 232; 73 N. E. 7; *Sedwick Damages*, 9th Ed., Vol. 1, pp. 491, 504. At times the only evidence available may be that supplied by testimony of experts as to the state of the art, the character of the improvement, and the probable increase of efficiency or saving of expense. *Dowagian Mfg. Co. v. Minnesota Molina Plow Co.*, 235 U. S. 641, 648, 649; *Suffolk v. Hayden*, 3 Wall. 315, 320; *U. S. Frumentum Co. v. Lauhoff*, *supra*."

At page 699:

"Value for exchange is not the only value known to the law of damages. *There are times when heed must be given to value for use, if reparation is to be adequate.* *Barker v. Lewis Storage & Trans. Co.*, 78 Conn. 198; 61 Atl. 363; *Green v. Boston & Lowell R. Co.*, 128 Mass. 221; *Citizens Bank v. Fitchburg Fire Ins. Co.*, 86 Vt. 267; 84 Atl. 970; *McAnarney v. Newark Fire Ins. Co.*, 247 N. Y. 176, 184, 185; 158 N. E. 902; *Sedwick*, *supra*, pp. 504-507.

* * * * *

"Formulas of measurement declared *alio intuitu* may be misleading if wrested from their setting and applied to new conditions. See, *e.g.*, *Standard Oil Co. v. So. Pac. Co.*, 268 U. S. 146, 155. *The market test failing, there must be reference to the values*

inherent in the thing itself, whether for use or for exchange. (Industrial General & Trust Co. v. Tod, supra.)”

See also: *Palmer v. Connecticut Ry. Co.*, 311 U. S. 544, where the U. S. Supreme Court approved an expert estimate of damage resulting from the loss of a lease having 969 years more to run, upon the ground that an injured party “is not to be barred from a fair recovery by impossible requirements” and a wrongdoer should not be permitted to escape “under cover of a demand for non-existent certainty.” (Citing *Sheldon v. Metro-Goldwyn Corp.*, 309 U. S. 390, 406-408.

B. PLAINTIFF'S EVIDENCE OF SPECIAL DAMAGE CONSISTING OF IMPAIRMENT AND DESTRUCTION OF VALUE OF REISSUE AND REMAKE RIGHTS OF PLAINTIFF'S COPYRIGHTED MOTION PICTURE.

In addition to pleading *general* damages of \$200,000 sustained by plaintiff by reason of defendants' copyright infringements [Complaint, Para. X, Tr. p. 5] plaintiff pleaded *special* damage as follows:

“That prior to the infringements hereinbefore complained of, the rights to re-issue, reproduce and remake said motion picture photoplay entitled ‘MOVIE CRAZY’ were reasonably worth \$200,000.00 but by reason of the infringing acts of defendants hereinbefore alleged, the value of said rights has been totally destroyed and by reason of the premises plaintiff has been specially damaged in the further and additional sum of \$200,000.00.” [Complaint, Para. XI, Tr. p. 5.]

The findings made by the trial court with respect to the allegations of special damage were as follows [Finding X, Tr. p. 36]:

“The Court further finds that plaintiff’s rights to reissue and remake said motion picture photoplay entitled ‘MOVIE CRAZY’ were substantially damaged and impaired by reason of said infringing acts of defendants but that the extent to which said rights were impaired and damage did not and does not exceed the sum of \$40,000.00.”

Plaintiff contends that the evidence received upon the issue of special damage *compelled* a finding of at least \$200,000 special damage, and in this connection the plaintiff furthermore contends that defendants offered no competent evidence to contradict or impeach plaintiff’s witnesses.

In brief, plaintiff’s evidence was as follows:

Harold Lloyd, the president of the plaintiff corporation, testified that he had engaged in the motion picture business for thirty years or more; that he had charge of all his own productions; and that his experience covered the entire field of writing, production and distribution, “practically everything that there is to do with the [a] motion picture” [Tr. p. 98]. Prior to the release of defendants’ infringing motion picture, Mr. Lloyd testified that the value of reissue rights of the plaintiff’s motion picture was “well over \$100,000” and that the value of the remake rights was “200,000, probably a great deal more”; but that the value of both reissue and remake rights had been destroyed, since the release of the defendants’ infringing motion picture [Tr. pp. 104-105]. Mr. Lloyd further testified that reissuing a motion pic-

ture (“putting the same picture into distribution again,” *c.g.*, “making new prints from the same old negative”) was a well known practice in the industry and that re-making a picture was and is a practice “much engaged in” in the motion picture industry [Tr. p. 106].

Mr. Lloyd furthermore testified that he was fully informed and had knowledge as to the prices currently paid in the industry for remakes and reissues of old pictures [Tr. p. 107]. However, Mr. Lloyd testified that it had been his intention “to remake all my popular pictures over myself” and that he was sure in this way his older pictures such as “MOVIE CRAZY” would be of a great deal more value to him than to anyone else [Tr. p. 110].

With respect to the particular sequence misappropriated by the defendants, Mr. Lloyd testified that “the whole sequence is naturally tied into the story; it is the heart of our story and without that particular sequence tied into it the story is certainly destroyed” [Tr. p. 137]. He further testified that the sequence in question was an integral and essential part of the story and that it played a functional part in the development of the picture; that it was “one of the funniest sequences I have ever had in in any picture, when you take out a chunk of film practically anywhere out of one of our pictures, you certainly destroy that picture” [Tr. p. 139]; further that the picture could not be reissued or remade without the sequence in question which was “one of about three or four of the funniest comedy sequences that I have ever had in my whole career” [Tr. pp. 140, 141].

Mr. Arthur Landau, an expert witness called by the plaintiff, testified that he had been in the motion picture business for approximately 25 years and had been associ-

ated with the World Film Corporation, First National Pictures and United Artists for more than ten years; that he had formed his own agency known as the Arthur Landau Agency and had subsequently joined with Edward Small to form the Small-Landau Agency representing independent producers, artists, writers, and story material, and that his duties required him to familiarize himself with the value of story material and completed pictures. That he had produced motion pictures for a period of three years either himself or in association with others; and that at the time of trial he was associate producer at United Artists Studio [Tr. pp. 253-255]. Mr. Landau further testified that he had been called and qualified as an *expert witness on behalf of the defendant Universal Pictures Company, Inc.*, in a plagiarism action brought by Anne Nichols (the author of "Abie's Irish Rose") against Universal and that in his opinion the value of the reissue rights of "MOVIE CRAZY" prior to the release of defendants' infringing motion picture was \$100,000 and that the value of the remake rights had been "around \$200,000"; but that since the distribution and release of defendants' infringing motion picture, such reissue and remake rights were not worth much of anything, *e.g.*, "a very nominal sum" [Tr. pp. 256-258].

Mr. Landau's primary reason for his opinion was that exhibitors would not purchase either a reissue or remake of Harold Lloyd's "MOVIE CRAZY" after having played or seen the defendants' infringing motion picture "So's YOUR UNCLE" [Tr. p. 258].

A third witness called by the plaintiff, A. M. Botsford, testified that he had been affiliated with the motion picture industry for over 25 years and had been connected with distribution of Paramount Pictures in 1100 or 1200 thea-

ters owned by Paramount-Publix Inc.; that he had been head of the Editorial Board at Paramount for two years and had then become executive assistant to the head of Paramount Studios for approximately five years, in which capacity he had produced approximately fifteen or sixteen pictures; that he had also been associated with 20th Century-Fox and had been Managing Director of the A & S Lyons Agency in Hollywood wherein one of his duties was to interest studios in the possible sale of motion picture rights and that he was definitely familiar with the general market conditions during the years 1942, 1943 and up to and including the date of trial [Tr. pp. 453-456]. Mr. Botsford further testified that he was familiar with motion pictures remade by Paramount and with lists of pictures for sale by producers and with the practice of reissuing pictures after they had been stored away for a number of years [Tr. pp. 458, 459]. Mr. Botsford testified that in his opinion the value of the reissue rights of "MOVIE CRAZY" prior to the distribution of defendants' infringing motion picture was \$100,000 "somewhere around that figure" and that the reasonable value of the remake rights were "from \$125,000 to \$150,000" [Tr. p. 462], but that after Universal released a feature picture containing the same sequence "the market is entirely off" [Tr. p. 465]; that in four or five years the "reissue and remake value might be worth something" but "certainly not what it would be worth if it were not for those pictures" [Tr. p. 464].

A fourth witness called by plaintiff, George Bentel, testified that he had been a producer of stage plays and motion pictures as vice-president and general manager of Oliver Morosco Productions, and in association with Louis B. Mayer and William Selig; and that he had acted

as a broker and agent of plays and motion pictures for twenty years or more, representing Jack London, James Oliver Curwood, and others and had familiarized himself with the market values of reissue and remake rights of motion pictures [Tr. pp. 196, 198] and that in his opinion the value of the reissue rights of "MOVIE CRAZY" was \$150,000 and the remake rights \$250,000 prior to the distribution and release of defendants' infringing motion picture; but that as of the date of filing the action that 90% of such value had been lost [Tr. p. 203; see also pp. 406, 410].

Defendants attempted to show that some of the damage to the reissue and remake rights of plaintiff's motion picture "MOVIE CRAZY" resulted from a prior release of a short two reel motion picture by Columbia Pictures Corporation entitled "LOCO BOY MAKES GOOD" in which the defendant Clyde Bruckman had misappropriated the same sequence, but each and all of plaintiff's witnesses testified that a "short" is not in competition with a feature length photoplay and that the sequence had been done so badly in the Columbia short that exhibitors who "bought the picture" would very likely not have exhibited it and that in any event no substantial harm or damage had been done to Lloyd's feature picture by the comedy short [See Lloyd, Tr. pp. 373-4; Botsford, Tr. p. 465; Landau, Tr. pp. 400-406].

Against this overwhelming evidence by well qualified experts that the plaintiff had sustained actual damage of \$250,000 or more (\$100,000 for loss of reissue rights and \$150,000 or more for destruction of remake rights) the defendants produced three witnesses who effectually disqualified themselves as having no knowledge concerning

either remake or reissue values with the possible exception of one witness, Hirliman, who testified he had “no opinion as to the remake value” [Tr. p. 427] and that he “did not know as to the reissue value but it had no value to me” [Tr. p. 425].

We proceed to analyze the testimony of defendants’ witnesses who, as stated by the trial court with respect to the witness Blake, “I want to say right now as far as this witness’ testimony, with his qualifications, that his testimony has practically no weight as to the issues involved” [Tr. p. 300].

The first witness called by the defendants with respect to the value of reissue and remake rights of Harold Lloyd’s motion picture was James Geller, who testified to experience as a story editor for one month at Universal and three years at Warner Bros., and prior to that time as a literary agent in New York and Hollywood [Tr. p. 265]. Geller was asked as to his opinion of the present value of the reissue and remake rights of “MOVIE CRAZY” to which he replied that such value was “negligible” [Tr. p. 267]; and that the reissue rights of “MOVIE CRAZY” were not in any way affected by the use of the misappropriated sequence in defendants’ motion picture [Tr. p. 268]. Upon cross-examination Mr. Geller testified, however, that he had never produced any motion pictures; that he had never distributed any pictures; that he had never sold any motion pictures; that he had no ideas as to what the plaintiff’s motion picture “MOVIE CRAZY” had grossed [Tr. p. 274]; that he did not know how many pictures had been reissued by Universal within the past ten years and hadn’t seen any that had been reissued [Tr. p. 275]; that he did know an Irene Dunne picture entitled “IMITATION OF LIFE” had been reissued

by Universal but did not know whether the gross on the reissue paid for advertising or prints [Tr. p. 276].

Mr. Geller furthermore testified that "MERTON OF THE MOVIES" (which generally dealt with the same theme) had been sold for remake but that he "had no idea of the price paid" [Tr. p. 279]; that he knew that Charles Chaplin's pictures had been reissued but was not familiar with the amounts received on the reissue of the same [Tr. p. 281]; that he was not familiar with the amounts received upon the reissue of any pictures and did not know what the consideration was upon the sale of reissue rights [Tr. p. 282].

It is obvious from a bare reading of Mr. Geller's cross-examination that he was not qualified to express an opinion as to the value of reissue or remake rights of the plaintiff's picture or of any other picture and that he had no knowledge whatsoever as to the prices paid for reissues or remakes of previous pictures. Certainly the testimony of this witness could not be accepted by any Court as overcoming the evidence of such experts called by the plaintiff as Lloyd, Landau, and Botsford, whose qualifications and experience were virtually conceded by the defendants, and who were abundantly prepared to support their testimony by specific figures as to amounts currently paid for reissue and remake rights of comedies comparable to the plaintiff's motion picture starring Harold Lloyd.

The second witness called by the defendants was Foster Blake, a branch manager of Universal Film Exchange,

a subsidiary corporation distributing motion pictures produced by the defendant Universal Pictures Company. Mr. Blake testified that he had an opinion as to the reissue value of the plaintiff's motion picture, to which the Court itself interpolated "there is nothing to show that this man has any qualifications in that respect" [Tr. p. 294]. The following excerpt from Blake's testimony is illuminating:

"The Court: . . . Have you ever had anything to do with the sale of pictures, for instance, like where Harold Lloyd owned this picture and the sale of it to another studio? A. No, sir. I am only selling pictures to theaters."

At the conclusion of Mr. Blake's testimony the court stated:

"I just do not feel that his testimony helps me" [Tr. p. 300].

The third and final witness called by defendants was George Hirliman who testified that he had been in the motion picture business for approximately thirty years and was the president of a company which purchased reissue and remake rights of motion pictures [Tr. pp. 420-421]. In this connection the witness testified that he had been associated with companies which for three and one-half or four years had purchased reissue rights to 150 or more feature motion pictures. Nevertheless Mr. Hirliman testified with respect to the reissue value of Lloyd's motion picture "Movie Crazy": "I don't know as to the

reissue value but it had no value to me.” [Tr. p. 425.] Upon the issue of remake value the witness expressly testified he had “no opinion” [Tr. p. 427].

Upon cross-examination Mr. Hirliman testified that he had leased 35 pictures from Samuel Goldwyn for purposes of reissue for a consideration of \$1,350,000; that he had paid Selznick \$100,000 for the purchase of Selznick pictures and that the estimated gross on the reissue of a comedy motion picture entitled “Topper” in the United States alone was in excess of \$250,000 [Tr. p. 443].

Although attempts were made by all of defendants’ witnesses, Geller, Blake and Hirliman, to minimize the importance of the sequence misappropriated from the plaintiff’s motion picture “Movie Crazy” there is no substantial evidence from any of these witnesses which overcomes or impeaches the evidence of the plaintiff’s experts Lloyd, Landau, Botsford and Bentel. Defendants’ own witnesses disqualified themselves and they and the Court commented on their respective lack of qualifications to testify as experts.

Another factor far more important than defendants’ lack of evidence, however, entered into the determination of the trial court that plaintiff’s damages were not more than \$40,000. That factor was a preconceived notion of the trial court that all motion picture values were inflated and that any figures which “emanated from Hollywood” were necessarily ten times higher than they should be and should be discounted proportionately.

C. THE PREJUDICIAL ATTITUDE OF THE TRIAL COURT
TOWARDS THE AMOUNT OF DAMAGES SUSTAINED BY
PLAINTIFF.

Despite an honest, conscientious and intelligent approach to the problem of liability, from the commencement of the trial the District Judge manifested an inclination to discount and minimize any evidence of moving picture production or distribution figures or which related to values or profits in the motion picture industry. In fact, the Court expressly stated: "The Court is dealing with an industry that it does not know anything about" [Tr. p. 110].

It is with extreme reluctance that we set forth specific examples reflecting the approach to the problem of damages by the Trial Court; but the following extracts from the record are abundantly illustrative of the Court's reaction to all of plaintiff's evidence regarding damages:

"The Court: The only thing is, Mr. Fendler, you must remember that this Court is not accustomed to dealing with figures that they deal with in Hollywood. *They always have a couple of extra ciphers on anything they deal with out there.*" [Tr. p. 72.]

"The Court: * * * As I have indicated to counsel, the *figures that come out of Hollywood sound like the national debt and they do not register very strongly with this court*, and if they did register with the special master I would not follow them." [Tr. p. 249.]

“The Court: Counsel, can’t you see the Court’s viewpoint after everything I have said? I will say it again. *These figures of \$100,000, \$200,000 are entirely out of line. You might as well mention the national debt.* Now, if you want to proceed along the same line, I will give you all the leeway you want. You may fill up the record with it and make it as large as you want. *I will sit here and listen, but as far as having any material weight with this court is concerned, it will not.*” [Tr. p. 441.]

In the court’s oral opinion he stated in part [Tr. p. 520]:

“I have listened to the *fanciful* figures that come out of the financial world at Hollywood and it is difficult, if not impossible, for a judge who is not a part of that atmosphere to comprehend or appreciate such *fantastic* figures.” [Tr. p. 520.]

* * * * *

“It may be because I am not a part of the atmosphere of the Hollywood financial world that I have been unfair to Mr. Lloyd, but I can only approach it from my own background. At different times during this case when I have endeavored to bring the parties together I warned you that probably when we finished neither side would be happy because *when one person insists on \$300,000 I move the decimal point over.* * * *” [Tr. p. 520.]

By quoting from the record—and the foregoing examples might be multiplied—we do not mean to charge

the trial court with being arbitrary, capricious, or unreasonable. We feel that Judge Harrison attempted to reach what in his opinion was an honest and fair judgment. Nevertheless a reviewing court is bound to consider all proceedings at the trial including any disposition upon the trial court to consider large figures as "fantastic" or "fanciful" where they are and can be supported by written contracts and documents brought to court for the very purpose of use in evidence. In no event should any witness or litigant be confronted with an attitude of mind on the part of the trial court that the figures "have a couple of extra ciphers" or that the decimal point is wrongly placed.

What would happen to our system of jurisdiction if every trial court or trial jury should assume that the figures testified in good faith and supportable by documentary evidence were ten times larger than they should be; or that justice can only be accomplished by "moving the decimal point over."

We do not feel that a new trial is necessary or desirable. We feel that upon this record the Ninth Circuit Court of Appeals can fix an amount of damages which is consistent with the evidence and can issue its mandate to the trial court directing the entry of a judgment in an amount fixed by this reviewing court as adequate and commensurate with the evidence. That amount, as we have previously indicated, should, in our opinion, be at least \$250,000.

POINT II.

The Trial Court Erred in Apportioning 20 Per Cent of Defendants' Profits to Their Copyright Infringement and in Refusing to Award Any Profits to the Plaintiff Upon the Ground That Plaintiff's Damages Exceeded Defendants' Profits.

A. THERE WAS NO EVIDENCE TO SUSTAIN THE ARBITRARY ALLOCATION BY THE TRIAL COURT OF 20 PER CENT OF DEFENDANTS' PROFITS TO THEIR COPYRIGHT INFRINGEMENTS.

The only evidence offered by the defendants in support of an allocation of profits resulting from infringing use of plaintiff's copyrighted material was during the testimony of James Geller, as follows:

“Q. By Mr. Knupp: Mr. Geller, in your opinion, assuming that the Universal picture ‘So’s Your Uncle’ made any profits, what proportion of the profits do you think were contributed by this sequence that we have been discussing?

Mr. Fendler: Objected to as calling for a conclusion of the witness upon a matter he is not qualified to testify to.

The Court: You are both delving into the same matters, so what is fair for one is fair for the other. Objection overruled.

The Witness: Will you please repeat the question?

(Question read by the reporter.)

A. I would have to be a genius to tell you that. I wouldn’t know. * * *

The defendants' witness Blake, who was the branch sales manager of the Universal Films Exchange in Los Angeles, expressly testified he did not believe he was qualified to answer the question as to what proportion of the profits earned by "So's Your Uncle" may have been contributed or may be charged or attributable to this particular sequence [Tr. pp. 299-300].

The fact that there was no evidence to support an apportionment of profits was thoroughly apparent both to plaintiff's counsel and defendants' counsel. We respectfully refer the Court to the following:

"Mr. Knupp: . . . If the question of profits is to be determined or to be considered in arriving at any judgment in this action, the question of the proportion of the profits which are justly attributable to the sequence of the two pictures is something it seems to me would have to be determined by evidence before the court. *There is no evidence of that before the court now.*" The Court heretofore indicated the matter might possibly go to a Master.

"The Court: I said the matter of profits but not the apportionment. Of course I realize that each case has to stand on its own bottom but it has grown into more or less a practice that profits are generally apportioned as in the Sheldon case. The courts to a great extent have followed that procedure.

Mr. Knupp: There are two cases that I know of that the court may have reference to in which I think that was true.

If we could assume or it were stipulated that that were so then we would not think it necessary that any evidence should be offered on the apportionment of profits, but *unless we have the assurance of coun-*

sel that the question will not be raised sometime or other that there was no evidence upon which the court could properly apportion the profits.

The Court: The court having seen both pictures and heard the evidence, I think it is within the sound discretion of the court, according to the decisions I have read, always bearing in mind that if there is anybody to be hurt it is the infringer.

Mr. Knupp: I think, if the court please, that provision for apportioning profits grew out of the similar provision in the patent law—that expert testimony on that matter would be considered.

In the Sheldon case the plaintiffs offered no evidence at all with respect to what proportion of the profits were justly attributable to the infringing material. The evidence was all offered on behalf of the defendants and the court arrived in that case at its determination, apparently not based on what the experts testified to, but placed the figure high enough where the court said in any event it should not exceed that figure. I understand in the case before Judge O'Connor tried in this District there was expert testimony before the court as to the apportionment of the profits. *The only thing that I fear is that there is some question as to whether the court can, without any evidence, arrive at a figure as to what is the just division of the profits as between the infringing material.*

The Court: You gentlemen are privileged to introduce all the expert testimony you desire, but in fixing the liability I am going to follow the Sheldon case.

Mr. Knupp: If the court announces that as its determination, I assume then, of course, evidence would be of no value in any event.

Mr. Fendler: We are prepared to offer evidence, if Your Honor please, that no allocation or profits can justly be made in this case. We are prepared to offer expert evidence on that at this time." [Tr. pp. 470-472.]

* * * * *

"The Court: *If there is any question about it I will listen to any testimony you care to offer.* If Mr. Fendler contends he is entitled to more than 20% he can put on his evidence to that effect.

Mr. Fendler: No, if Your Honor please. The evidence I propose to offer is that it is impossible to apportion profits to the infringement." [Tr. p. 474.]

* * * * *

"Mr. Fendler: Now, may I offer my evidence as to the impossibility of apportionment, if Your Honor please?

The Court: Yes.

Mr. Fendler: Mr. Botsford.

"Q. Mr. Botsford, in your opinion, is it possible to apportion profits received from the motion picture So's YOUR UNCLE to the particular sequence which has been heretofore designated as the 'magician's coat' sequence contained therein?

Mr. Abeles: I object on the ground it is irrelevant, incompetent and immaterial and not the proper proof under the authorities and contrary to the authorities.

The Court: Well, counsel, I have already stated what I am going to do. Why not let him proceed?

Q. By Mr. Fendler: What is your answer, Mr. Botsford? A. No.

Q. In your opinion it is not possible? A. It is not possible—I don't think so.

Mr. Fendler: That is all.

The Court: That is true of any picture, is it not?

The Witness: That you cannot apportion what part of the picture makes a profit.

The Court: That is what I have in mind.

The Witness: I could not think so. I think you would be a genius if you could.

Mr. Fendler: That is all." [Tr. pp. 477-478.]

To summarize the foregoing, the court stated it intended to arbitrarily fix 20% of the profits as allocable to the infringement. Counsel for both plaintiff and defendants directed the court's attention to the fact that there was no evidence in the record to support such a finding. The plaintiff produced evidence that apportionment of profits was impossible. The only evidence produced upon this point by the defendants completely corroborated plaintiff's evidence; the witness Geller expressly testifying that he "didn't know" what proportion of the profits of Universal's picture "So's YOUR UNCLE" were contributed by or allocable to the misappropriated sequence [Tr. pp. 270, 271]. In fact Geller's answer was almost precisely the same as Botsford (plaintiff's witness), Geller stating in answer to the question as to apportionment: "I would have to be a genius to tell you that; I wouldn't know" [Tr. p. 271].

Under the circumstances we submit that the finding as to the allocation of profits is without support in the evidence and that under the authorities and the evidence introduced in the trial court, the District Judge had no alternative but to hold that 100% of the profits realized by

the defendant Universal Pictures Company Inc. belonged to the plaintiff.

The authorities are uniform in support of the proposition that the burden of allocating profits or damages is upon the wrongdoer; and in the absence of definite proof by the defendant that profits resulting from use of infringing material are *not* the result of the defendants' acts, the court will hold all of the profits should be awarded to the owner of the property misappropriated.

In *Callaghan v. Meyers*, 128 U. S. 617, the Supreme Court stated at page 665:

"It is the defendants who are responsible for having blended the lawful with the unlawful and they must abide the consequences on the same principal that he who has wrongfully produced a confusion of goods must alone suffer."

In *Belford v. Scribner*, 144 U. S. 148, the Supreme Court restated the rule at page 508:

"The rule is well settled, that, although the entire copyrighted work be not copied in an infringement but only portions thereof, if such portions are so intermingled with the rest of the piratical work that they cannot well be distinguished from it, the entire profits realized by the defendants will be given to the plaintiff. This was the rule laid down by this court in *Callaghan v. Myers*, 128 U. S. 617, 665, following *Mawman v. Tegg*, 2 Russell, 385, 391, and *Elizabeth v. Nicholson Pavement Co.*, 97 U. S. 126, 129."

In *Davilla v. Brunswick-Balke-Collender Co.*, 94 F. (2d) 567, the Second Circuit Court of Appeals decided that a plaintiff was entitled to 100% of the profits realized from the sale of a double phonograph disc, although the

infringing musical composition appeared on only one side of the record and the other side of the disc contained a musical composition which was more modern and might well have been responsible for most of the sales of the double record. The Second Circuit Court of Appeals allowed 100% of the profits made from the sale of the entire record stating at the conclusion of its opinion:

“Appellant offered no proof, however, as to the cost of making up its composition nor of the sales advantage of one composition over the other. . . .
In the absence of such proof appellant’s claim cannot be sustained.”

A fortiori the evidence in the instant case not only lacks a basis or measure of apportionment but affirmatively dispels the possibility of apportionment because the witnesses on both sides agree that no apportionment was possible [Geller, Tr. p. 271; Botsford, Tr. p. 477-8].

B. THE COURT ERRED IN REFUSING TO AWARD ANY PROFITS TO THE PLAINTIFF.

The evidence was uncontradicted [Deft. Ex. 1, Tr. pp. 476-477] that the gross proceeds derived by the defendant Universal Pictures Company from the distribution of the infringing motion picture So’s YOUR UNCLE aggregated \$208,812.92; and that after deducting \$133,874.50 for costs and expenses and \$54,421.14 for “distribution fees” (which were retained by the defendant Universal or its wholly-owned subsidiary distributing corporation) that the profit remaining amounted to \$20,517.28 [Tr. p. 477].

The trial court declined to allow all or any portion of these profits to the plaintiff, holding as a matter of law—and we submit contrary to law—that since the damages

sustained by the plaintiff exceeded the profits conceded to have been made by the defendant, that the plaintiff was not entitled to receive all or any portion of the profits derived by the defendant from its distribution of the infringing motion picture.

This determination by the trial court is found in its conclusion of law numbered IV [Tr. p. 39] as follows:

“That the plaintiff is not entitled to judgment awarding all or any portion of the profits which the defendant Universal Pictures Company Inc. shall have made, received or derived from said copyright infringements by reason of the fact that the actual damages suffered by plaintiff due to said copyright infringements exceeds the aggregate amount of profits made, received and derived by said defendant from such copyright infringements.”

We submit that this conclusion of law embodies an entirely erroneous conception of the Copyright Statute and completely misinterprets the decided cases. The Copyright Statute itself provides in part as follows:

“Section 25. Infringement. If any person shall infringe the copyright in any work protected under the Copyright laws of the United States, such person shall be liable: * * * (b) To pay to the copyright proprietor such damages as the copyright proprietor may have suffered due to the infringement, *as well as all the profits which the infringer shall have made from such infringement*” (March 4, 1909, Chap. 320, Para. 25, 35 Stat. 1081, 17 U. S. C. A. 89).

If Congress had intended to allow “either damages *or* profits, whichever is larger in amount”, why does not the statute so provide? If the phraseology “damages *as well*

as all the profits" is to be construed as "either damages or profits whichever is the largest in amount" we have judicial legislation which is inconsistent with the express wording of the statute and which is in contravention of every decided case where both damages and profits appeared and in which both damages and profits were allowed to the plaintiff (*e. g. Atlantic Monthly Co. v. Post Publ. Co.*, 27 F. (2d) 556).

All textwriters and all courts, with one possible exception, agree upon a construction of the Copyright Act in accordance with its precise phraseology.

Amdur, Copyright Law and Practice, p. 1117, paragraph No. 6 "*Profits in Addition to Damages*":

"The copyright owner is awarded the profits derived by the infringer *in addition* to the damages sustained by the proprietor. In this respect recovery in copyright infringement differs from patent suits, for in the latter only the greater of the two, profits *or* damages, is recoverable, not both."

Dean William Hale states the rule in his article in 18 *Corpus Juris Secundum*, 248:

"Actual damages suffered by plaintiff, *in addition to the profits* made by defendant from the infringement, may be recovered."

Siebring Pottery v. Steubenville Pottery, 9 Fed. Supp. 384:

"Under the copyright law a plaintiff is entitled *not only to the profits* of defendants but *also* an amount equivalent to the damage it has suffered."

The same rule is applicable to trade-mark infringements. See *John Stetson Co. v. Stephen L. Stetson*, 58 Fed. Supp. 586 at 596:

“The trademark owner may still recover *damages in addition to defendant's profits.*”

At this point we deem it only fair to the trial court to point out that its decision that plaintiff was only entitled to recover damages or profits, *whichever was the larger in amount*, appears to be predicated solely upon a House Committee Report (numbered 2222, 60th Congress, 2nd Session, Sec. 15) which was incidentally referred to by the Court in *Sheldon v. Metro-Goldwyn Corporation*, 309 U. S. 390 at p. 400. This Report did in fact state in 1909 that the courts up to that date “usually construed” the existing patent statute to mean that a patent infringer was liable either for damages or profits, whichever was the greater in amount. We respectfully direct the attention of this court, however, to the fact that *since* 1909 both damages and profits have been awarded in patent cases, as against a wilful infringer (see for example, *Dowagiac Mfg. Co. v. Deere & Webber Co.*, 284 Fed. 331, 338, C. C. A. 8th (1922); and the authorities hereinbefore cited by us expressly hold a copyright infringer to be liable for both damages and profits. (*Amdur Copyright Law and Practice*, p. 1117; 18 *Corpus Juris* Sec. 248, etc.; see also *Goldmark v. Kreling*, 25 Fed. 349, at page 356.)

In no event, however, can the *Sheldon* case be deemed authority for the position taken by the trial court *because no issue was raised in the Sheldon case as to damages:*

damages were neither pleaded nor proven. The sole issue was whether the copyright proprietor was entitled to recover all or merely a portion of the profits, where the uncontradicted evidence established only a small share of profits as allocable to the infringements and showed most of the profits were in no way attributable thereto.

The petitioners in the *Sheldon* case had argued that there could be "no apportionment of profits" (309 U. S. 390 at p. 398). The Court invoked the analogy of the patent cases in construing Subsection (b) of Section 25 of the Copyright Act providing that an infringer was liable for "all the profits which the infringer shall have made from such infringement"; and held in effect that where no damages are pleaded or proven and the plaintiff elects to seek 100% of the profits, the defendant may prove, by competent evidence that only 20% or even a smaller proportion of the profits are the result of and attributable to the copyright infringement and that the remainder of the profits are not related thereto.

The *Sheldon* decision is particularly significant in that the plaintiffs had testified they had offered to sell the motion picture rights for \$30,000 to the defendants but notwithstanding this testimony the court awarded \$117,000 to the plaintiffs. In the instant case the plaintiff Harold Lloyd Corporation proved actual damages of \$250,000 or more resulting from the infringements and there is no evidence that the profits admittedly received by the defendants were capable of apportionment. In fact the evidence on both sides is that apportionment was impossible.

Under the circumstances plaintiff here contends that it was entitled to an award of *both* damages *and* profits as expressly provided in the Copyright Act.

POINT III.

Where Damages as Well as Profits Are Difficult of Ascertainment the Court Should Award Statutory Damages in Such Sum as Shall Appear to Be Just (Bearing in Mind That the Statutory Schedule of \$100 for the First Infringing Performance and \$50 for Each Subsequent Infringing Performance, Is by Statute Expressly “Not to Be Regarded as a Penalty”).

Section 25 of the Copyright Act expressly provides that the copyright proprietor may recover from an infringer “in lieu of actual damages and profits such damages as to the court shall appear to be just and in assessing such damages the court may in its discretion allow the amounts as hereinafter stated. . . .

“Fourth: In the case of a dramatic or dramatico musical or orchestral composition, \$100 for the first and \$50 for every subsequent infringing performance” (Section 25(b) March 4, 1909, Chap. 320, 35 Stat. 1081; Aug. 24, 1912, Chap. 356, 37 Stat. 489).

It is the plaintiff's contention that it was discretionary with the court to award such statutory damages “as to the court shall appear to be just” “in lieu of actual damages and profits” if the trial court—or if this Court—should determine that the nature and circumstances of the case require such award. (*Douglas v. Cunningham*, 294 U. S. 207 at 209; *Brady v. Daley*, 175 U. S. 148, 154; *Bundy Eng. v. Sheldon*, 127 F. (2d) 661, 662, 2nd C. C. A.; *No-Leak-O-Piston Ring Co. v. Norris*, 277 Fed. 951, 4th C. C. A.; *Turner & Dahnken v. Crawley*, 252 Fed. 749 (9th C. C. A.); *Fargo Merc. v. Brechet*, 295 Fed. 823, 829 (8th C. C. A.).)

The defendants took the position at the trial that actual damages were so speculative, remote and conjectural that the court was not justified in awarding to the plaintiff any actual damages whatsoever. Inasmuch as the same speculation and conjecture applies to any attempt to apportion or determine what profits, if any, were made by the defendant Universal Pictures Company from its infringements, we submit as an alternative to be considered by this Court, the authority granted by the statute to award statutory damages in lieu of actual damages and profits.

The number of theaters in which the defendants' infringing motion picture was exhibited in the United States was stipulated as 6636 theaters [Tr. p. 90].

It was also stipulated that the records of the Southern California branch of the Universal Film Exchange (a subsidiary distributing corporation wholly owned by Universal Pictures Company Inc.) reflected the fact that in Southern California 248 theaters exhibited the defendants' infringing picture on 566 play dates [Tr. p. 90].

The significance of these stipulations was stated by plaintiff's counsel at the trial as follows [Tr. p. 169]:

"There is in evidence a stipulation of 6,636 theaters. The evidence here in California, from the Southern California Exchange, shows a ratio of 2.28 playing dates to each theater. If that measure be applied to the 6,636 theaters there will be in excess of 15,000 playing dates; and the court will take judicial notice that the playing dates include anywhere from two to four performances. In other words, if it is on a Saturday or Sunday, there are four performances; if it is just in the evening, it is two performances.

"So we actually have the evidence before Your Honor to establish 30,000 or more infringing per-

formances on the basis of the stipulations in evidence.”

It is well settled that each exhibition of a photoplay constitutes a separate infringing performance. (*Tiffany Productions v. Dewing*, 50 F. (2d) 911; *Patterson v. Century Productions*, 93 F. (2d) 489; *Kalem Films v. Harper Bros.*, 222 U. S. 55; (see also *Brady v. Daly*, 83 Fed. 1003 and 13 Corpus Juris 1149).)

The statutory schedule of \$100 for the first infringing performance and \$50 for each subsequent infringing performance, upon the basis of 30,000 infringing performances, would give the plaintiff a judgment of approximately \$1,500,000. We believe such a judgment would be excessive inasmuch as the plaintiff has testified that the total value of the reissue and re-make rights destroyed by defendants' infringements aggregates only \$250,000. By the same token we feel a judgment for \$40,000 is utterly inadequate.

We therefore submit that the court should allow the statutory damages of \$50—not for each infringing performance—but for each of the 6636 theaters in which the infringing motion picture was exhibited (regardless of the number of play dates or of the actual number of infringing performances in each theater). In this connection we direct the attention of the court to the fact that the only theaters specifically named in the evidence are the Pantages and Hill Street theaters in Los Angeles where the infringing motion picture entitled “So's YOUR UNCLE” played an entire week [Tr. pp. 292, 293]. We believe the court might take judicial notice that these two theaters situated at 7th and Hill Streets and 8th and Hill Streets respectively in Los Angeles, are two of the largest downtown thea-

ters, running at least twelve hours per day, seven days per week, showing each feature motion picture four to five times each day, and that the minimum number of performances to thousands of persons at each exhibition, would be twenty-eight infringing performances and exhibitions each week. It would certainly not be unjust or unfair to the defendant Universal Pictures Company to require it to pay the full statutory schedule of \$50 for each infringing performance. We do not wish, however, to impose any unjust burden. We therefore submit that \$50 for each theater throughout the United States—regardless of the number of infringing performances—is a fair and just award well within the limits contemplated by our legislators when they provided that the full amount scheduled in the statute “shall not be regarded as a penalty” (March 4, 1909, Chap. 320, Section 25(b), 35 Stat. 1081; 17 U. S. C. A. 88).

It should also be noted that the trial court expressly found that the infringements by defendants were each “with the full knowledge and notice of plaintiff’s rights” [Finding VIII, Tr. p. 35]:

“In this connection *the court expressly finds that defendants and each of them at all times were fully informed and had full knowledge that they were infringing upon plaintiff’s copyright and the court further finds that the defendant Universal Pictures Company Inc. could and should have reasonably foreseen said infringements upon plaintiff’s copyright.*”

Where the defendants act with full knowledge of plaintiff’s rights and in wilful disregard thereof, every doubt as to damages should be resolved against such infringers. (See *Consolidated Rubber Tire Co. v. Diamond Rubber*, 232 Fed. 475, C. C. A. 2; *Rose v. Hirsch*, 94 Fed. 177 at C. C. A. 3.)

Conclusion.

We respectfully submit that with the entire record before this Court, it will expedite justice to have all controverted issues finally settled and determined, including the amount of damages and/or profits, or in the alternative the amount of statutory damages fixed by this court. A new trial will merely once again place the matter at large with a second appeal inevitable.

We are willing and anxious to have the litigation finally determined by an award which this court deems just under all the circumstances and upon all the evidence.

We respectfully submit that plaintiff should be awarded at least \$250,000 actual damages plus 100% of the profits; or in the alternative and in lieu of actual damages and profits, that plaintiff should be awarded such statutory damages as this Court shall deem fair and just.

Respectfully submitted,

HAROLD A. FENDLER,

Attorney for Cross-appellant and Appellee Harold Lloyd Corporation.

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

UNIVERSAL PICTURES COMPANY, INC., a Delaware Corporation and CLYDE BRUCKMAN,

Appellants,

v.

HAROLD LLOYD CORPORATION, a California corporation,
Appellee.

HAROLD LLOYD CORPORATION, a California corporation,
Appellant,

v.

UNIVERSAL PICTURES COMPANY, INC., a Delaware Corporation and CLYDE BRUCKMAN,

Appellees.

OPENING BRIEF FOR APPELLANT AND CROSS-APPELLEE UNIVERSAL PICTURES COMPANY, INC.

JULIAN T. ABELES,
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New York, N. Y.

FILED

AUG 29 1946

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No. 11286

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

UNIVERSAL PICTURES COMPANY, INC., a Delaware
corporation and CLYDE BRUCKMAN,
Appellants,
vs.

HAROLD LLOYD CORPORATION, a California corporation,
Appellee.

HAROLD LLOYD CORPORATION, a California corporation,
Appellant,
vs.

UNIVERSAL PICTURES COMPANY, INC., a Delaware
corporation and CLYDE BRUCKMAN,
Appellees.

**OPENING BRIEF FOR APPELLANT AND CROSS-
APPELLEE UNIVERSAL PICTURES COMPANY, INC.**

This is an appeal by defendants (Tr. p. 44) from a judgment of the District Court of the United States, for the Southern District of California, Central Division, holding that plaintiff's copyright in its motion picture entitled "Movie Crazy", has been infringed, by the use of six "gags" or pieces of "stage business" used in a comedy routine in the motion picture of defendant Universal Pictures Company, Inc. (referred to as defendant Uni-

versal) entitled "So's Your Uncle", which had been previously used in plaintiff's said motion picture, and awarding plaintiff damages in the sum of \$40,000, and costs including attorneys' fees of \$10,000.

Plaintiff has taken a cross-appeal (Tr. p. 48) from the whole and every part of said judgment.

I.

The Pleadings.

The complaint (Tr. pp. 2-7) contains two causes of action. The first cause of action alleges that defendant Clyde Bruckman (referred to as defendant Bruckman) was employed by plaintiff as one of the writers of its motion picture entitled "Movie Crazy", copyrighted by it on September 15, 1932, and that defendant's motion picture entitled "So's Your Uncle", of which defendant Bruckman is credited as author, infringes plaintiff's said motion picture, to plaintiff's general damage in the sum of \$200,000, and that said infringement has destroyed the right to re-issue, reproduce and re-make its said motion picture to plaintiff's special damage in the additional sum of \$200,000. The second cause of action repeats the prior factual allegations, and further alleges that immediately upon discovery of said infringement on or about March 20, 1945, plaintiff notified defendants in writing to withdraw defendants' motion picture, but that defendants have continued said infringement, from which profits have accrued to which plaintiff is entitled. Judgment is demanded for damages, an injunction and an accounting of profits. The respective answers (Tr. pp. 17-26) deny the material allegations of the complaint, except it is admitted that defendant's motion picture credits defendant Bruckman and two other writers as authors, and that on or about March 20, 1945 defendant Universal received a written notice to withdraw its said motion picture.

The action is for copyright infringement, brought under Sec. 25 of the Act of March 4, 1909, Ch. 320, 35 Stat. L., pt. 1, p. 1081; Aug. 24, 1912, Ch. 356, 37 Stat. L., pt. 1, p. 489 (17 U. S. C., Sec. 25), jurisdiction of which is conferred on the District Court of the United States [Act of March 4, 1909, Ch. 320, Sec. 34, 35 Stat. L., pt. 1, p. 1084 (17 U. S. C., Sec. 34)], in and for the district of which defendant is an inhabitant or may be found [Act of March 4, 1909, Ch. 320, Sec. 35, 35 Stat. L., pt. 1, p. 1084 (17 U. S. C., Sec. 35)]. The jurisdiction of this Court to review the judgment is conferred by the Act of March 4, 1909, Ch. 320, Sec. 38, 35 Stat. L., pt. 1, p. 1084 (17 U. S. C., Sec. 38). Timely notice of appeal was filed by defendants on February 6, 1946 (Tr. p. 44).

II.

The Facts.

A. Synopses of Plaintiff's and Defendant's Motion Pictures.

(The Alleged Infringed and Infringing 'Gags' or "Stage Business" Are Indicated In Italics.)

Plaintiff's Motion Picture "Movie Crazy."

Harold, a small town boy, has day dreams of being a Hollywood star. By accident he mails another photograph for his own to a film company, and receives a letter that they will give him a screen test. Upon arrival in Hollywood he strolls on the studio lot while Mary and Vance are acting a scene. Asked to fill in as an extra, he disrupts everything. O'Brien the producer, thinking he is the one whose picture he received, orders the test. It's raining, and Harold helps Mary put up her car top, with disastrous results. For all his clumsiness, Mary takes a liking to him and asks for his class pin, but Harold says he will give it only to the one girl. O'Brien sees the test, with twenty-six retakes be-

cause of Harold's blunders. Harold must have deliberately sent him a "phony photo". Harold not recognizing Mary made up for a Spanish part, is deeply impressed and gives her his class pin. Later Mary tells Harold she knows they are in love, and he must get that pin back from the Spanish girl. When he sees Mary in her Spanish make-up, he agrees to one long kiss for the pin—he gives the kiss but he does not get the pin. He borrows a class pin from a school friend. When he offers it to Mary, she tells him she knows what really happened, and they are "washed up". He sends a note to Mary, but she replies on the back of a dinner dance invitation that she will not see him. Harold reads the invitation instead of the note and attends the dance. Upon entering a man spills water on him, and he goes to the wash room and *puts on a magician's coat by mistake*. Pending Mary's arrival Harold dances with Mrs. Kitterman, wife of the film company head. *Dove flies from coat to man's head; egg drops from coat, Harold puts it in cup on table, opened by waiter and chicken comes out; second egg drops from coat, Harold puts it in man's hand as he swats fly on his forehead; Harold pulls rabbit from coat and puts it under covered platter being served guest; water squirts on Mrs. Kitterman from flower on coat and seeing man flipping water at girl throws it in his face; water again squirts on her and she slaps Harold and leaves floor in anger; Harold dancing with "movie vamp" and water squirts on both Mrs. Kitterman and O'Brien; white mice are released from box in coat, one going down Mrs. Kitterman's back and the others causing general confusion*. Magician threatens Harold. Mary denies she invited him and waiters throw him out, the invitation falls out of his pocket and he sees Mary's note. The filming of a fight scene becomes the real thing when Harold and Vance fight it out over Mary. Kitterman is so impressed with Harold's impromptu performance, that he signs him to a contract. Mary decides that with all Harold's faults she loves him still.

Defendants' Motion Picture "So's Your Uncle."

Young Steve Curtis is penniless after repeated failure to have his play produced, in which he uses make-up, including a beard, to resemble his wealthy uncle. His uncle disapproves of the show business and wants his nephew to work in his office. Leaving the theatre in this makeup, Steve is hit by Pat's car. Thinking him an elderly man, she takes him to her home, where she resides with her wealthy Aunt Minerva. When Minerva, enraptured by Steve's flattery, expresses her fondness for the theatre, Steve says she must meet his nephew, who has just written a play. Steve subsequently returns as the nephew, to find that Minerva has arranged for its production. When Steve tells Minerva his uncle is taking a long trip, she suddenly loses interest in the play. Later Steve returns as the uncle and the trip is off and the play is on. Pat, Minerva, Steve (as the uncle) and Pat's boy friend Roger attend a night club. Steve goes to the washroom to remove the beard and *puts on a magician's coat by mistake*. He returns to the table as the nephew and dances with Pat. *Dove flies from the coat to woman's head; elastic line of handkerchiefs snaps against woman; egg drops from coat and Steve puts it in man's hand as he swats fly on his forehead; water squirts on woman from coat and seeing man stirring water in glass she throws it in his face; Steve pulls rabbit from coat and puts it under covered platter being served guest; white mice are released from box in coat, one going down back of woman dancer and the others causing general confusion*. Steve discards coat and magician grabs it from a waiter and knocks him down. It's hamburgers and love for Pat and Steve in a lunch wagon. Steve sends Minerva a note, purportedly from his uncle, that he is going out of their lives forever, his nephew is no good, she should not produce the play, and Steve should find a job and marry a nice girl like Pat. Steve returns as the uncle, supposedly a victim of amnesia, and is informed Pat is marrying his

nephew. Minerva hands him a check for five thousand dollars to give his nephew for the play. To Steve's dismay, Minerva tells Pat she and the uncle are also engaged. They give a party to announce both engagements. Steve appears as the nephew, and while upstairs effecting a change to the uncle, the real uncle Curtis arrives. When he denies the engagement, Minerva assumes he has had another amnesia attack. All ends well for the four of them, when Steve informs his uncle that Minerva is the Oil Baron's daughter.

Plaintiff's picture was produced from 1930 to 1932 and released in 1932 (Tr. p. 70). "Mr. Fendler—the ordinary life of the first issue of a picture is three years" (Tr. p. 70). Plaintiff's picture ceased to be exhibited in the United States "about three years after the release date" (Tr. p. 190). Defendants' picture had its first preview in Glendale, California on July 20, 1943, was generally released throughout the United States on December 3, 1943 and was first exhibited in Los Angeles, California on January 5, 1944 (Tr. p. 384). The running time of plaintiff's picture is 65 minutes, 40 seconds, while the running time of the entire magician's coat comedy routine (in which the alleged infringed "gags" and "stage business" appear) in plaintiff's picture is only 11 minutes, 14 seconds. The running time of defendants' picture is 63 minutes, 21 seconds, while the running time of the entire magician's coat comedy routine (in which the alleged infringing "gags" and "stage business" appear) in defendants' picture is only 6 minutes, 1 second (Tr. pp. 384, 385).

The same alleged infringing "gags" and "stage business" in defendants' picture had been previously used by defendant Bruckman, without plaintiff's authorization, in a two-reel comedy picture produced by Columbia Pictures entitled "Loco Boy Makes Good", starring three well known comedians, which was generally released throughout the United States on January 8, 1942 and continued to be exhibited to the time of the trial

(Tr. pp. 61, 154, 390, 397). The running time of this comedy routine in the Columbia picture represented more than one-third of the running time of the picture (Tr. p. 385).

The first notice of plaintiff's claim was in a written communication received by defendant Universal from plaintiff's attorney under date of March 20, 1945 (Tr. pp. 385, 386). Lloyd admitted that plaintiff had acquired notice of the use of the alleged infringing material in defendants' picture some time prior to the notice of March 20, 1945, but said he could not recall when (Tr. pp. 152, 153), and that one of plaintiff's employees, Mr. Murphy, would know the date (Tr. pp. 152, 153):

“The Court: The only thing is that the witness says he doesn't know. You are asking him questions and trying to tie him down to something that he keeps telling you he doesn't know. He says Mr. Murphy attended to those things and could give you the information, but he does not have the dates.” (Tr. p. 153)

Mr. Murphy was not called by plaintiff and it offered no evidence to refute defendant's proof, that plaintiff had deliberately failed to notify defendants of the alleged infringement, until over fifteen months after the general release of defendant's picture.

Defendant's counsel stated to the Court that defendant Universal had stopped the exhibition of the picture immediately upon receipt of plaintiff's notice (Tr. pp. 382, 383) and was prepared to offer such proof (Tr. p. 452), when plaintiff stipulated, that upon its receipt of notice of the alleged infringement, it instructed all of its exchanges to stop the exhibition of the picture until the matter was judicially determined, and that the exhibition was thereupon discontinued (Tr. p. 452).

B. Testimony of Plaintiff's Witnesses

HAROLD LLOYD - President of plaintiff since its inception, and had charge of the productions in which he appeared (Tr. pp. 98, 99). Over defendants' objections and subject to motion to strike (Tr. pp. 100, 102, 104, 105) and without the proof of any facts to support the same, the witness was then permitted to testify:

"Q. Prior to the release of the motion picture entitled So's Your Uncle by Universal during the month of December, 1943, what was the value of the re-issue rights of the motion picture Movie Crazy?

A. I would say it should be well over \$100,000.

Q. And what was the value of the re-issue rights of Movie Crazy after the production and distribution of So's Your Uncle?

A. I would say it has been destroyed.

Q. What was the value of the re-make rights of Movie Crazy before the production and release of the Universal picture So's Your Uncle as of December 1, 1943?

* * * *

A. I would say it would be \$200,000, probably a great deal more, according to the quality of the picture.

Q. By Mr. Fendler: What is the value of the re-make rights of Movie Crazy as of the present time?

A. I would say that also was destroyed." (Tr. pp. 104, 105)

[The Court ruled that this testimony of the witness established that such rights had "a market value" (Tr. p. 107)].

It was his "intention to re-make all my popular pictures over myself, and what has not been stated is the making of my pictures myself I am sure would be of great deal more value to me to re-make them, myself, with a young personality than it would for someone else who

probably would not make them in the same manner or the same degree that I would make them. At least I feel like that. That, I think could be corroborated—Chaplin re-issued his Gold Rush and did certain things with it” (Tr. p. 110). Thus the only example he could give of an old picture of this nature having ever been revised was Chaplin’s “Gold Rush”, but as a re-issue and not as a re-make. He was 51 years old, and for over seven years had not acted in any picture (Tr. p. 112). The current popularity of the star is an important factor in determining the value of a picture (Tr. p. 113). The comedy incidents in the magician’s coat routine were deleted from plaintiff’s prior picture “Welcome Danger” and fitted into its picture “Movie Crazy” (Tr. p. 132). Plaintiff’s counsel conceded: “The picture was over-footage and the sequence was not used at that time” (Tr. p. 73). Plaintiff had never re-issued any of its pictures (Tr. p. 136), and the re-issue rights had never been sold, licensed or disposed of to any of its pictures (Tr. p. 354). “Q. Suppose you sell the re-issue rights would they be valuable too?—The Witness: My pictures are not for sale; therefore, you are asking me about something I haven’t gone into” (Tr. p. 354). While he first testified that the re-make rights to one of his pictures “Milky Way” had been sold (Tr. p. 136), he was later obliged to admit that the picture “doesn’t belong to me” (Tr. p. 354). He evaluated such rights solely upon the prospective profits that plaintiff might make if it ever should exercise such rights, or the prospective profits some other producer might make if plaintiff should ever sell such rights.

“Q. Your idea, as I understand it, is these re-issue rights might be sold to somebody who would have new prints made of the film and would distribute it throughout the theatres of the country?

A. They might do that or I might do it myself.” (Tr. p. 149)

* * * * *

“Q. By Mr. Abeles: You say you had in mind two things—either you would re-make it or somebody else

would re-make it, is that correct?

A. Naturally.

Q. Now, if you re-made it did you have in mind that figure you testified to as being the profit that you would make from making the picture? * * *

The Witness: You are asking me to assume something. I think you can make a great deal of profit if I made it myself and I think someone else could make a great deal of profit if they also re-made it." (Tr. p. 360)

* * * * *

"Q. When you state that figure who have you got in mind would re-make it? You or somebody else?

A. Myself or somebody else. It would be according to how well done it is. That is what I tried to make plain" (Tr. p. 361).

"Q. By Mr. Abeles: What do you base that figure upon if you re-made it yourself? That is a simple question. Just answer that, please, Mr. Lloyd.

A. Well, I just stated that other pictures have been made, many of them?

Q. Is that an answer?

The Court: In other words, what is your opinion from your experience in the industry?

The Witness: Other pictures have been re-made and made tremendous amounts of money. What is the reason to assume that my picture cannot be just as good as the other pictures that have been re-made?

Q. How would you make \$400,000 or \$500,000 if you made the picture yourself? Do you mean the profit you would make out of it? Is that what you have in mind?

A. Naturally, that is what you would make out of it." (Tr. pp. 362, 363)

The Witness conceded that it was not a common practice in the industry to re-issue or re-make old motion picture subjects:

"Q. What is the final disposition of a picture after it has once been exhibited?

A. Well, after a picture has been withdrawn from circulation it is generally held for a certain number of years.

The Court: Where is it held?

The Witness: Well, whoever happens to own it. If the studio owns it they probably keep it in their laboratory and then after so many years if they feel there is a different audience for it then it is considered for either re-issue or re-make." (Tr. pp. 366, 367)

* * * * *

"The Court: Is there any sale value to those pictures? Is there any trading in the industry in those old pictures?

The Witness: You take old pictures like the Klansman which Griffith made many years ago—I think as I recall—I am speaking vaguely now, but I think it was re-issued and probably made quite a lot of money, and I think DeMille's King of Kings or his Ten Commandments were reissued at various times." (Tr. p. 367)

* * * * *

"The Court: And is that more or less of a common practice in the industry?

The Witness: Well it could be.

The Court: Well, do you know whether it is?

The Witness: I think it is to a degree." (Tr. p. 369)

The witness subsequently conceded that he was not qualified and in no position to express any opinion as to the availability or value of such rights:

"The Court: And do they interchange them between studios?

The Witness: I think so.

The Court: Don't you know?

The Witness: I am not positive because I have kept myself more or less in the production end of the business. * * * " (Tr. p. 369)

The Court recognized that this testimony had completely disqualified the witness:

"I was asking general questions as to the practice in the industry which will probably come out through other witnesses that have handled that end of the business and will be qualified to testify." (Tr. p. 371)

He knew of no picture in the entire history of the industry, of the nature of plaintiff's picture (a secondary story and situation comedy specially written for the individual personality of a motion picture comedian, as distinguished from a motion picture based upon a famous stage play or novel) that had ever been re-made:

"Q. * * * Now you say other pictures have been made and they made a lot of money on re-make—let me ask you this question: Do you know one single picture, just one, made by a named comedian that had a secondary story and situation comedy that has been re-made, and that means Chaplin, you, Keaton, St. John, Langdon, Laurel & Hardy—anybody. Just name one single picture of that type that has ever been re-made?

A. I am doing something right now in a picture that no other comedian has done in motion pictures; I don't think they have. I don't know whether they have or haven't.

Q. You don't know, then. That is enough.

A. I wouldn't go that far to say that. I simply say that because you are asking me the question. I would have to look it up. I am not assuming that it has not been done.

Q. But you don't know of any one instance where it has been done, do you?

A. I know the picture that Chaplain made, The Gold Rush.

Q. I am not saying that; I say re-make.

A. I claim it could be done by him. Whether they have done it or haven't done it I think is beside the point." (Tr. pp. 363, 364)

Thus the witness acknowledged, that the only picture of this type that had ever been made which in his opinion might be successfully re-made, was Chaplin's picture "The Gold Rush".

The witness mentioned the value of the re-make rights of the motion picture "Abie's Irish Rose", but had to admit that it was the other type of picture, i. e., based upon a very famous stage play, which had been performed by a number of companies for a long period of time throughout the United States (Tr. pp. 355, 356).

"Milky Way", the only old comedy picture of either type that to his knowledge had ever been sold for re-make, was likewise based upon a novel and stage play, and had only been bought "as a guide" for making another picture, and not for re-make (Tr. pp. 368, 369-371). Defendant's counsel offered to establish by Lloyd's testimony, that in the defense of a prior action instituted against plaintiff for infringement in the use by plaintiff of the same type of material in the same type of picture, he had testified that all of plaintiff's pictures consisted of only a secondary story and situation comedy comprising "gags" and "stage business," specially written for the individual personality of the star, as distinguished from pictures based upon famous stage plays and novels. The Court sustained plaintiff's counsel's objection upon the ground:

"The Court: I am not going to permit you to impeach your own witness.

* * * * *

Mr. Abeles: Judge, I am not impeaching him. When I am reading from a record as to what the witness said in that case, that the story of his pictures meant nothing, only the comedy which was created for his personality.

The Court: Counsel, I have ruled.

Mr. Abeles: That is all. Under the circumstances I can't go any further with this witness." (Tr. pp. 365, 366)

He felt that the use of the alleged infringing material in the magician's coat comedy routine in defendants' picture, would cause him damage because "they would probably class me as an imitator and they probably would be tired of seeing the scenes" (Tr. p. 150). It was immaterial that defendants' picture was not a major picture, if it was exhibited in the same type of theatres as major pictures (Tr. p. 156).

"Q. You know the Universal picture was a 'B' picture, did you not, So's Your Uncle?

A. It played in all the theatres where major pictures play, therefore, it is seen by all people that see major pictures. I don't know what classification they put it in.

Q. You don't know how many people saw it, do you?

A. I just stated it played in over 6,000 theatres. That is quite a few." (Tr. p. 156)

For the same reason the witness had to concede that although the Columbia picture was not a major picture, if it was previously exhibited in the same type of theatres, "I would say it had done me a great deal of harm if it had played in all the theatres the other one played in" (Tr. p. 159). This testimony was given at the first session of the trial commencing September 10, 1945. The trial did not resume until November 16, 1945. In the interim defendant Universal took the deposition of a representative of Columbia, who testified that its picture (containing the magician's coat comedy routine) had been exhibited in 7,065 theatres in the United States, "in all types of cities, both large and small, throughout the United States—in all types, kinds and characters of motion picture theatres in the United States, varying from large to small theatres in metropolitan areas as well as theatres in large and small towns" (Tr. pp. 389-391). Defendant's picture had only been exhibited in 6,636 theatres in the United States, without any evidence adduced as to the types of theatres (Tr. p. 90).

Upon the adjourned date plaintiff's counsel called upon the witness to "correct that answer or to enlarge it". The witness then changed his testimony and said that in his opinion the Columbia picture did not affect plaintiff's picture, because "a great many times shorts are purchased by the theatres but are not always shown— Sometimes they are purchased and never shown them" (Tr. pp. 373-375). However, this was dissipated by the testimony of the Columbia representative, that his records established its picture "was exhibited in 7,065 theatres in the United States" and "in all types, kinds and characters of motion picture theatres" (Tr. p. 391).

MAURICE LEO – Writer of motion picture material since about 1934 (Tr. p. 216). Wrote the story outline and original version of defendant's screen play "So's Your Uncle" (Tr. p. 218). Subsequently wrote in the magician's coat comedy routine supplied by the producer, who thought it would fit nicely into the night club sequence (Tr. pp. 220, 227). The witness admitted that it was against his better judgment "because I thought it was dated and old-fashioned" (Tr. p. 221). The night club sequence had already been written by him, in which (as in the later version) the leading character appeared as both the nephew and the uncle, and changed coats in the wash room to masquerade as the other man, and the only change effected in the later version was to fit in the "gags" and "stage business" of this magician's comedy routine (Tr. p. 228).

GEORGE R. BENTEL – Since 1923 authors' agent in the sale of manuscript plays for stage production (Tr. p. 197). While he testified on direct that prior to 1923 he was connected with an organization that had produced certain "plays and pictures" (Tr. p. 196) he admitted on cross that such productions were limited to stage plays (Tr. p. 412). Over defendant's objections (Tr. pp. 198-202) and without proof of any supporting facts, the witness was permitted to testify that in his opinion, prior to the release of defendants' picture the re-issue

rights of plaintiff's picture were worth \$150,000 and the re-make rights \$250,000, and after the release of defendants' picture both rights had lost 90 per cent of their value (Tr. pp. 202, 203). He based his opinion entirely upon "outstanding examples" of the increased prices that were being paid by other producers "for motion picture rights to an outstanding subject, a successful stage play or best-seller novel" (Tr. pp. 205-206). The ordinary period for the re-making of a picture is four years after its release (Tr. p. 205). (Plaintiff's picture was released in 1932 [Tr. pp. 70, 190].) While he was doubtful if Lloyd could successfully re-make plaintiff's picture, he considered it had a value because "Somebody might buy the re-make rights" (Tr. p. 209). In his opinion the Columbia picture had not damaged plaintiff's picture, because "I would not understand why any exhibitor would want to show it" (Tr. p. 409). When the Court brought out that the evidence established the Columbia picture had been exhibited in the same type of theatres as plaintiff's picture, the witness said this would not change his opinion "Because the Lloyd picture was so superior and that particular situation was handled so much better in the Lloyd picture that you got an entirely different impression" (Tr. p. 410).

A. M. BOTSFORD - Connected with a talent agency. "We in that agency try to interest studios in the possible sale of motion picture rights but I don't remember of any sales that we made." (Tr. pp. 455, 456)

"The Court: * * * What do you know about the custom in the industry with reference to the disposition of films that have run their course and have been put away in storage, as to whether or not they are ever brought out and used again?

The Witness: Yes, I think they are." (Tr. p. 457)

His experience in the sale of the re-issue and re-make rights to motion pictures was confined to his prior association with Paramount, and "there was no sale" ever

made of such rights although "We did have a long list of pictures which we were willing to sell to other producers" (Tr. p. 457). In fact he had knowledge of only one sale ever having been made of such rights by a producer:

"The Court: Do you have any knowledge of any picture, without naming them or the amount of the sale of those pictures, do you have any knowledge of such sales to third parties?

The Witness: I know of the sale of, yes, one in particular. There are probably others." (T. p. 459)

Such old pictures were retained only because of the possibility of some future use:

"The Court: * * * Then the purpose of retaining those old films is three-fold: One, possible re-issue, possible re-make and possible sale to a third party?

The Witness: Correct." (Tr. p. 459)

Upon only such qualifications and no supporting facts, and over defendant's objections (Tr. pp. 457, 460-462) he then testified:

"By Mr. Fendler: What in your opinion was the value of the re-issue rights as of December, 1943, of Movie Crazy?

A. Well, I will have to qualify that by saying that my knowledge of that comes from the fact that I know that the distribution department would say to us unless we can make \$100,000 there is no use of re-issuing it. Now, in the case of Movie Crazy I would say somewhere around that figure.

Q. Do you have an opinion as to the value of the re-make rights of Movie Crazy as of that date?

A. Yes.

Q. What in your opinion was the value or what would have been the reasonable value of the re-make rights of Movie Crazy as of that date?

The Witness: I would say from 125 to 150 thousand dollars. I can qualify that if you like— It is based on the fact—it depends on who wants it and for what purpose they want it.” (Tr. p. 462)

That since the release of defendants’ picture:

“A. I wouldn’t think it would be very good for re-issue or re-make now.” (Tr. p. 464)

He admitted on cross, that he based his estimate solely upon the supposition that Paramount would not be interested in any old picture, unless they anticipated that much profit:

“Q. So it depends on whether or not they could make \$100,000 on the picture?

A. That is an arbitrary figure. They would say they want to make so much money.

Q. You mean make a \$100,000 profit?

A. Yes.” (Tr. p. 467)

He only knew of one comedy picture “Hold That Blonde”, in the entire history of the industry, that had ever been used for re-make (Tr. p. 470), and even in that one instance only. “the story” was used and not any part of the comedy sequences or material.

“A. * * * That was a picture made by Raymond Griffith which was a comedy. * * * The story was taken from the Griffith picture and re-made for Eddie Bracken. * * *” (Tr. p. 463)

He did not know if the story had been written specially for Raymond Griffith, or if it was based upon a stage play; he only knew the “picture was devised for Raymond Griffith” (Tr. p. 469).

Pictures with original stories are not comparable with pictures based upon stage plays or novels:

“Q. Have original stories in many instances been much more profitable when made as motion pictures?

A. No.

Q. Motion pictures based on plays and stories?

A. Yes'' (Tr. p. 469).

The Columbia picture damaged plaintiff's picture "Depending on how many people saw the Columbia short and what type of people they were * * * If it were actually played in the same type of theatres * * *." (Tr. pp. 464, 465)

ARTHUR M. LANDAU - Associate producer of United Artists Studios (Tr. p. 253). Previously employed by motion picture producers, in the distribution of their original motion picture productions, and later acted as agent in the placing of talent and story material (Tr. pp. 253, 254). Was only familiar with original story material and motion pictures, having had no experience in re-issues or re-makes (Tr. pp. 254, 255). Without any qualification or factual basis, and over defendant's objections (Tr. pp. 256, 257) the witness was permitted to testify that in his opinion the re-issue rights of plaintiff's picture were worth "I would say over a hundred thousand dollars" and the re-make rights "Around \$200,000", before the release of defendants' picture, and that after its release as to the re-issue rights "Well, I don't think they are worth much of anything" and the re-make rights "A very, very nominal sum" (Tr. pp. 255-260). The following stamped the testimony of this witness as utterly biased and worthless:

"The Court: The question, in substance, was that this same sequence had appeared in a Columbia picture in 1941; and if you had known that, would that have had any bearing upon your answers that you have heretofore given?

The Witness: No, it would have no bearing upon it.

The Court: In other words, it was just because the sequence was in So's Your Uncle that you feel that the value was destroyed?

The Witness: Well, there are a lot of contributing factors to that answer. One is this: That the execution of it by Harold Lloyd as an actor in that picture—

The Court: I know, but the other picture was not by Harold Lloyd. The sequence in the other picture, of course—

The Witness: My answer would be the same.” (Tr. pp. 261, 262)

C. Testimony of Defendant's Witnesses

FELIX ADLER — Had forty-five years experience in the entertainment field, first appeared in vaudeville and burlesque, presently employed by Columbia Pictures Corporation, and previously employed for many years in the motion picture industry as a writer or “gag man”, in which capacity he had been employed by plaintiff at the time of its production of the motion pictures “Welcome Danger” and “Movie Crazy” (Tr. pp. 318-320, 327). Prior to the production of “Movie Crazy”, plaintiff had “practically a facsimile” of the same magician’s coat comedy routine written in its picture “Welcome Danger”, after the picture was photographed, as comedy accretion to the story (Tr. pp. 320, 321, 331). The “stage business” of putting on a magician’s coat by mistake and the props unexpectedly dropping out, was taken by plaintiff from the act of Maximillian & Martin, and a scene in a Charlie Chaplin picture in which he does a magician’s comedy routine with a coat (Tr. pp. 321, 322). The “stage business” of dropping an egg in a man’s hand and of his breaking the egg on his head in slapping an insect, was taken by plaintiff from a Mack Sennett picture, and had been used in many other pictures (Tr. p. 323). The “stage business” of water unexpectedly squirting out of a flower in a coat lapel on someone who thinks it was done by a person holding a glass of water, was taken by plaintiff from a number of Mack Sennett pictures and from a Fox picture (Tr. pp. 324, 325). The “stage business” of rabbits, doves, eggs and mice com-

ing out of a magician's coat was stock material (Tr. p. 326). None of the "stage business" in this comedy routine had any relationship to the story or development of the plot of "Movie Crazy" (Tr. p. 332). Since the days of the medicine man and burlesque, "gags", and "stage business" of this nature have always been considered common property, so that it has been a common practice for writers of this material (known as "gag men") and comedians, to exchange such material and fit it in their own comedy routines (Tr. pp. 330, 331, 338-340). This was the first instance that the witness had ever heard of anyone claiming the exclusive right to such material (Tr. p. 340). It was for this reason that the same "gags" and "stage business" of the magician's coat comedy routine had been used by the witness and defendant Bruckman in the Columbia picture prior to their use in defendants' picture (Tr. pp. 335-338). (The Court rejected the testimony offered upon the cross-examination of Harold Lloyd, that such "gags", "stage business" and comedy routines were used interchangeably by all studios, and that Lloyd persistently followed this practice [Defendants' offer of proof, Tr. pp. 121-128].)

JAMES GELLER - Story editor for defendant Universal. Had been chief story editor of Warner Bros. and determined the availability and value of its motion picture material. Was previously agent for writers and in the sale of material (Tr. pp. 265, 266). Deemed the re-issue rights of plaintiff's picture negligible, as pictures of this type "that have been made over a period of years have rarely, if ever, re-issued. They might be re-issued in certain specific places as museum pieces, or there might be here and there a theatre in various cities that might claim re-issues, but I doubt whether they would go as far back as ten or twelve years, with the exception of the Charlie Chaplin pictures" (Tr. p. 267). (This concurred with Lloyd's testimony that only one picture of this type, Chaplin's picture "The Gold Rush", was ever re-issued after such length of time [Tr. pp. 110, 364].) If

such a picture was re-issued, he doubted if the returns would equal the prints and advertising costs (Tr. p. 267). (The Court subsequently excluded the testimony of George A. Hirleman that he could not recoup such costs from the re-issue rights to one of Lloyd's pictures [Tr. pp. 430, 460].) It had no re-make value because it had passed its vogue (Tr. p. 268). The picture contained fifty to one hundred comedy routines, so that elimination of the magician's coat routine could not affect its value. When the picture was first issued the name of Harold Lloyd attracted the audience, and if it was re-issued today only curiosity could be the attraction (Tr. p. 269). While it was a box office attraction when it was made, this would be no criterion as to the value of the re-issue or re-make rights of a picture made that long ago (Tr. p. 274). (Plaintiff's picture was made in 1930-1932 [Tr. p. 70].)

CLYDE BRUCKMAN (defendant) – Presently employed by defendant as a "gag" writer (Tr. p. 231). Motion picture writer for approximately 25 years (Tr. p. 91). Wrote sub-titles in the days of silent pictures. Employed as "gag" man, writer or director by Warner Bros., Buster Keaton, Mack Sennett Pictures, Monty Banks Productions, Hal Roach Studio, Metro-Goldwyn-Mayer, Columbia, Universal, Lloyd and other studios (Tr. pp. 450, 451). While in plaintiff's employ, was one of the writers of "Welcome Danger" and "Movie Crazy" and directed the latter (Tr. pp. 91, 92, 94). The "gags" and "stage business", comprising substantially the same magician's coat comedy routine, had been previously used by plaintiff in its picture "Welcome Danger", and deleted before its release (Tr. pp. 232, 233). The straight type of magician having become old-fashioned, it was a common practice to have comedy routines, in which others would imitate magicians and expose the tricks, "putting comedy into the acts, modernizing them" (Tr. p. 235). Defendants' picture was substantially completed when he added this comedy routine. The night club scene and dance sequence had been completed, when Yarbrough, the pro-

ducer, said he needed some comedy in the dance sequence, so the witness added such "gags" and "stage business" (Tr. pp. 235, 236). Yarbrough made no suggestion as to the nature of the comedy material he desired (Tr. p. 236). As it was a common practice for "gag" men to use "gags" and "stage business" of this nature that had been used before, Yarbrough made no objection to the use of such material (Tr. pp. 237, 238). The witness had continually followed this same practice during the term of his employment by plaintiff (Tr. pp. 238-241).

JEAN W. YARBROUGH (Producer of defendants' picture) - He had authorized Bruckman to add this comedy routine in the dance sequence in defendants' picture, because "I was told by Mr. Bruckman that material of this nature had been used two or three times, over a period of years previously" (Tr. p. 449). (The producer of the Columbia picture had authorized its use for the same reason [Tr. pp. 337, 338], and it had been continuously exhibited as a part of the Columbia picture for almost two years prior to the release of defendants' picture, without plaintiff's objection.)

W. W. LARSEN - A magician and manufacturer of magician's props (Tr. p. 310). Member of all magicians' societies (Tr. p. 314). Prior to 1932 it was a common practice to combine magicians' acts with comedy routines, on the stage and in night clubs and hotels (Tr. p. 310). In such comedy routines a person who was not a magician would put on a magician's coat, whereupon props accidentally appeared to come out of the coat (Tr. pp. 310, 311). In one comedy routine when an egg dropping out of the coat was broken, a chicken emerged instead of the yolk (Tr. p. 311). In another a rabbit would be put under a serving cover (Tr. p. 312). Since he was a boy it has been a favored subject of cartoons, articles and stories, of a person who was not a magician getting into a magician's coat and things of this nature unexpectedly happening (Tr. p. 313). For many years it was common practice in magicians' comedy routines for a

stooge from the audience to get into the magician's coat by mistake, and then all the props would accidentally come out (Tr. pp. 316, 317).

GEORGE A. HIRLIMAN — Prior to the attendance of this witness, the Court had said that none of plaintiff's witnesses were qualified to establish its damage, and that the only testimony that could have any bearing or weight would be that of someone dealing in such rights:

“The Court: Gentlemen, I am interested, insofar as expert testimony is concerned, in that of these men that deal in these pictures * * * older films that are being re-issued or re-vamped. That is the testimony that I am interested in—in something that will have some weight with me.

* * * * *

The Court: * * * I am not familiar with the question of the re-makes and the re-issues, etc., and there are those in the industry who are and who should be able to give the Court real aid. The only witness, so far, that I can recall at this moment, who has had a broad comprehension of the industry is Mr. Lloyd himself. I realize that he is the plaintiff and an interested party, and these employees of Universal are virtually in the same position.

If there is such a thing as disinterested witnesses in the industry, that we do not feel they are bound one way or the other and can give the Court their frank, honest testimony on the question of the re-issues and the practice in that regard, and the re-make and the practice, and the salability of films that have been out for ten years and have been in cold storage since then, I would like to have that aid.” (Tr. pp. 300, 301, 303)

Lloyd subsequently admitted that he had no experience in that end of the business and no knowledge of any “common practice” in dealing in such rights (Tr. p. 369)

and the Court recognized that as he had not "handled that end of the business" he was not "qualified to testify" (Tr. p. 371). Lloyd had testified that he had heard there was someone who had purchased such rights to certain Goldwyn pictures and that his attorney had the figures to show what this party had paid for such rights (Tr. p. 369). Defendants had then procured the attendance of this witness, who testified as follows:

About 30 years in the motion picture industry. Originally in the laboratory end of the business. For about 10 years produced pictures for Metro-Goldwyn-Mayer, Republic, RKO, Fox, Grand National and independents (Tr. p. 420). Presently president of International Theatrical and Television Corp. which, together with 10 other companies owned by it, is engaged in the business of dealing in re-issue and re-make rights to motion pictures (Tr. p. 420). His organization, of which he is the managing director, is considered the largest, or one of the two largest, companies engaged in the purchase of such rights (Tr. p. 421). His companies had purchased such rights to many of the outstanding motion pictures based upon famous stage plays and novels (Tr. pp. 421-425). While they had paid \$1,350,000 for such rights to only 30 Goldwyn pictures costing \$100,000,000 to produce, they paid only \$80,000 for such rights to 411 Hal Roach comedy pictures costing \$25,000,000 to produce (Tr. pp. 423, 444, 446). The principal consideration for the Roach purchase was the picture "Topper" (which plaintiff's counsel conceded to be "One of the outstanding comedies"), starring Cary Grant and Constance Bennett, which was based upon a very famous novel by a famous author, whose books are still in great demand (Tr. pp. 423, 438), so that the remaining 410 pictures, all of which were recorded since the advent of sound (Tr. p. 446) represented only a nominal part of the total consideration of \$80,000. Of these 410 pictures, 400 were two and three-reel shorts and 11 feature pictures of which 7 were Laurel and Hardy features (Tr. p. 446). The purchase of such rights to these 410 pictures even at that time, and

for this nominal sum, was occasioned by the abnormal condition during the war, of a picture shortage:

“The Witness: There has always been a certain amount of re-issue business but it became more profitable and more common with the war when there was a shortage of film and pictures.” (Tr. p. 434)

In this respect the witness explained that while any picture, comedy or otherwise, based upon a famous stage play or novel might have a re-issue or re-make value, a situation comedy, of the nature of plaintiff's picture, where the story and comedy material was written specially for the personality of a particular comedian, would have no value for any such purpose:

“The Court: As a matter of fact, isn't there a demand for that type of pictures in certain theatres?

The Witness: If they are of the classic type. I mean a picture like Wuthering Heights or Lady Vanishes. They could probably be issued four different times.

The Court: Aren't there some theatres that make a business of showing only old pictures over again?

The Witness: What they call art theatres, which only play the classics or foreign pictures or things like that. * * * ”

* * * * *

“The Court: The Court is interested in this witness' testimony as to whether there is any re-issue value in a comedy. That is really what I am interested in. Let me ask this question: Comedies have re-issue value the same as any other type of picture do they not?

The Witness: It all depends, your Honor, on what they were based on.

The Court: Well, if they are still funny and make people laugh and people want to see them they are still valuable, aren't they?

The Witness: Would you like me to enlarge on that and explain what I mean?

The Court: Yes.

The Witness: The picture Mr. Fendler refers to, Topper, is from a very famous novel by a very famous author whose books are still in great demand. When I referred to the other type of picture—I don't recall that I used the word 'comedy' but if I did I meant a picture that was made up of a lot of situations and there was no original famous play or story or stage play or something which would more or less live forever. I don't think Topper comes into the classification of a comedy in the sense of a situation comedy.

* * * * *

Q. (Mr. Fendler) In fact, some of the most famous moving pictures, both in the silent and talking picture days, have been originals which have been developed at the studios, isn't that right?

A. And were re-issued?

Q. I am not talking about re-issue.

A. I am not testifying on new pictures. I am testifying with reference to re-issues.

* * * * *

Q. Ruggles of Red Gap. Does that refresh your recollection?

The Witness: You have the same situation there as you have with Topper. You have another famous author.

* * * * *

Q. Would it surprise you to know that Danny Kaye is now acting in a production of Goldwyn of a remake of Harold Lloyd's Milky Way?

A. That also was taken from a play, wasn't it? (Tr. pp. 434, 437-440, 448)

* * * * *

Q. Now to your knowledge, and this is the last question, to your knowledge, do you know of any

picture containing a secondary story—that is a story that is not a famous or outstanding story, whether original or otherwise, where the material was written for a comedian,—situation material written for a comedian like Lloyd or Chaplin or Buster Keaton that was ever re-made in one single one?

A. No.” (Tr. p. 448)

There is no regular market for such rights to even pictures based upon famous stage plays and novels, it being purely a matter of trading for the purchase of the rights to such a picture that is deemed of value for such purpose:

“The Court: Well, whatever a picture sells for is only a small part of the original cost?

The Witness: Very small.

* * * * *

The Court: Then really when you want a picture it is simply a question of horse trading?

The Witness: Yes, sir.

The Court: Dickering back and forth?

The Witness: Yes.

The Court: You find a picture which you feel has a re-issue value and then you try to buy it?

The Witness: Yes, sir.

The Court: Now, do you deal directly with the owners of those films or do you generally deal through brokers?

The Witness: Generally directly with the owner.

The Court: But there are brokers who engage in that business?

The Witness: Not that I know of.” (Tr. pp. 435, 436)

Whether a picture has any re-make value depends upon whether it has any re-issue value (Tr. p. 427). Plaintiff's picture had no re-issue value to him (Tr. p. 425) because it is dated, and does not have a star who is a present-day box office draw.

“The Court: It is true then that pictures that have seen their day in a sense, are re-issued and re-distributed to your advantage?

The Witness: If they are not dated by either wardrobe or costumes or technique.

* * * * *

Q. Now, I will ask this question: Why wouldn't you buy the re-issue rights to this picture? * * * Upon what do you base that statement, Mr. Hirli-man?

A. The picture is dated. It doesn't have a star in it who in my opinion has a big box office draw today.

Q. Has it any story value?

A. Has it any story value?

Q. Yes. Is there any outstanding story there that can be made apart from the comedy?

A. No, sir.

Q. By Mr. Abeles: What is the type of picture? What type of material is in the picture?

A. Gags.

Q. Gags for situations? Gags for Harold Lloyd personally, is that what you would say?

A. I would.” (Tr. p. 428)

Lloyd had testified that the re-issue rights had never been sold, licensed or disposed of to any of his pictures: “A. No; because I haven't had them up for sale” (Tr. p. 354), and that this applied among the others to his picture “Safety Last”, such rights to which he considered “very valuable” (Tr. p. 352). The witness contradicted Lloyd's testimony:

“Q. Now, Mr. Lloyd said that no re-issue rights were ever sold to any of the motion pictures that he produced. Did you ever buy the re-issue rights to any of Mr. Lloyd's motion pictures—any motion pictures produced by Harold Lloyd?

A. I did.

Q. What is the name of that motion picture?

A. Safety last.

Q. When did you buy the rights to re-issue that picture?

A. In either 1932 or 1933." (Tr. pp. 428, 429)

Thereupon, testimony of the witness was offered to refute Lloyd's testimony that the re-issue rights to both "Movie Crazy" and "Safety Last" were "very valuable", and to confirm the unimpeached testimony of both plaintiff's and defendants' witnesses that such rights to a motion picture of this nature, with a secondary story not based upon a famous stage play or novel and situation comedy written for a particular comedian had no re-issue value. (Such rights to plaintiff's picture "Safety last" had been purchased by the witness for only \$3,500 [Tr. p. 460], and not one exhibitor would take the picture because there was no demand for the re-issue rights to any picture of this nature [Tr. p. 460].):

"Q. How much did you pay for them?

* * * * *

Mr. Fendler: May I direct your Honor's attention to the fact that you would not permit—

The Court: I am aware of that. Your objection to the amount is a good objection because I sustained an objection of yours to the same question.

Mr. Abeles: If your Honor please, the distinction is this: In this case I am asking the witness to testify to a fact.

The Court: Just a moment, counsel, I have ruled. In the first place, it is a collateral matter and in the second place, if the re-issue rights of a picture were sold we do not know whether it was comparable to the picture in issue. It does not mean anything to the Court.

* * * * *

Q. After you purchased the re-issue rights to the motion picture Safety Last, were you able to sell it to one single exhibitor in the United States?

* * * * *

The Court: Objection sustained.

Mr. Abeles: Mr. Lloyd testified that that picture had very valuable re-issue rights.

The Court: The picture involved is the only one we are interested in." (Tr. pp. 428-430)

(Such rights were purchased by the witness at the time of the release of plaintiff's picture "Movie Crazy", when Lloyd was at the height of his popularity.)

The Court had previously permitted plaintiff's witness Bentel to testify, over defendants' objections (Tr. pp. 198-202), to the amounts he had read or heard that such rights to motion pictures based upon famous stage plays and stories, had been sold for (Tr. p. 206). Likewise, although the Court excluded Hirleman's testimony that he had only paid \$3,500 for the re-issue rights to a Lloyd picture, and could not get a single exhibitor to take it, plaintiff's counsel, over defendants' objections (Tr. p. 442), interrogated the same witness as to the payments made by him for such rights to motion pictures based upon famous stage plays and stories (Tr. pp. 442, 443).

III.

Statement of the Case.

Defendants
(a) ~~Plaintiff's~~ witness Hirleman testified, that the deletion of the "gags" and "stage business" of the magician's coat comedy routine would not affect plaintiff's picture, because it was not a part of the general theme and was only tied in as comedy accretion (Tr. pp. 447, 448). The Court likewise developed this upon its examination of Lloyd:

"The Court: I know. But it was no part of the general theme?

The Witness: It was to the extent it was woven into the plot in that it more or less made his chances of success much less.

The Court: I know. But that sequence was

brought in when this girl, by mistake, used the other side of an invitation.

The Witness: That is correct.

The Court: So that it was cut into the picture through that.

The Witness: That is the way he was brought into the party, yes.

The Court: That was the way that was brought in.

The Witness: That is used because that is a basic comedy idea of a man getting into a place by mistake. We consider that the more a man is laboring under a misapprehension in getting into some place where he does not belong, that it puts him into a unique comedy situation.

The Court: Of course, there isn't anything new about that.

The Witness: No, I am not claiming anything new about it. The new part was that the rebuff was on one side and the invitation was on the other, and he looked at the wrong side. That was the unique part, getting him into the situation.

The Court: There would not be anything new about a person misunderstanding an invitation, that is, that particular fact.

The Witness: That, of course, is not the point I am trying to bring out.

The Court: That was simply a means of transition from your general theme of breaking into the movies.

The Witness: That is right; that is right. It was just a means of getting him in there by mistake.

The Court: That was the medium used there. The comedy scene that was inserted and the mistake in that invitation part was simply the means of transition." (Tr. pp. 142, 143)

The Court had recognized that it was not the outstanding sequence of plaintiff's picture:

"The Court: In my opinion, just looking at the picture, I think your fight down there in that vessel

was the outstanding sequence of that picture.” (Tr. p. 141)

The Court had said that the question was if it “could have been withdrawn and another sequence inserted therein and the same general theme of *Movie Crazy* could be reproduced” (Tr. p. 139). The Court subsequently recognized, that as this sequence was not a part of the general theme, it could be deleted without affecting the picture:

“The Court: And I have been asking questions, I want to say frankly, because I feel that this is a part of the whole that could be lifted out and I am trying to get that approach.” (Tr. p. 141)

(b) While it was never contended that the individual “gags” or “stage business” in this comedy routine were copyrightable, the Court acquiesced in plaintiff’s untenable contention, that the particular combination or sequence of these “gags” or “stage business” was the subject of copyright protection, and judgment was rendered on that basis.

Lloyd conceded it was a sequence of “gags”:

“Q. So that each of those pieces—those are really what you call ‘pieces of business’, Mr. Lloyd, pieces of comedy business?

A. They are gags within a comedy scene and those comedy scenes make up the whole sequence.

Q. Oh, each one considered separately, then, you define as a gag?

A. The actual happening is the gag, the little—
Mr. Knupp: I think that is all.” (Tr. p. 137)

However plaintiff’s counsel contended that the particular combination of “gags” and sequence of action, constituted an original copyrightable work (Testimony of defendant Clyde Bruckman):

“Q. By Mr. Fendler: And the particular combination of gags with the particular sequence of action

as finally depicted on the screen of Movie Crazy was original, was it not?

The Court: As far as you know?

A. As far as I know, yes." (Tr. p. 95)

In which the Court concurred (Testimony of Felix Adler):

"The Court: Did you ever see that combination of gags, you might call it, or events that transpired in that sequence?

The Witness: Not that particular sequence.

The Court: No." (Tr. p. 334)

The Court found that such "consecutive scenes constituting the so-called 'magician's coat sequence'" were copied and misappropriated by defendants (Finding VII, Tr. p. 34).

(c) The Court ruled that the price received for such rights to another picture could have no bearing upon the value of such rights to plaintiff's picture, and was inadmissible (Tr. pp. 108, 109, 377, 378, 444, 445, 457); the following for example:

"The Court: Counsel, what another picture sold for in my opinion is not admissible. * * * One may have been sold for a large sum of money but whether it is comparable to another picture is a different question altogether." (Tr. pp. 377, 378)

"I have expressed myself several times with reference to this matter. It has no weight with me, because what one picture might bring is no indication of what another picture might produce." (Tr. p. 444)

In view of this ruling, there was no basis, factual or otherwise, for the opinion of any of plaintiff's witnesses as to the value of such rights to pictures of this nature

which, as the Court said, "have been out for ten years and have been in cold storage since then" (Tr. p. 303). The Court said that none of plaintiff's witnesses were qualified to evaluate such rights (Tr. pp. 303, 371) but was of the opinion that Lloyd, as an officer of plaintiff, "just like an owner of a piece of property could testify, whether he has any qualifications for it or not, as to what its value is. He could probably answer that very quickly" (Tr. p. 101), and that the mere testimony of Lloyd as to his opinion of such value, unsupported by any facts, established a market value. "I think you go far enough with this witness when he testifies that they have a market value" (Tr. p. 107), although Lloyd conceded that he had no experience in that end of the business and was not qualified to evaluate such rights (Tr. p. 369). The Court's determination that such rights to plaintiff's picture had a substantial value, was based solely upon this testimony which the Court said established that there is a market for such old films (Tr. p. 521), although all of plaintiff's witnesses conceded that no picture had ever been re-made and only one re-issued, of this nature:

"It has been brought out in the evidence in this case that the film, after it has had its run is virtually placed in cold storage and becomes a part of the stock pile for use again at some other date either by the owner or somebody to whom the owner sells the right to that picture. The evidence also discloses that there is an open market for films that have been successfully displayed. The fact that you can pick up almost any newspaper and in looking through the ads covering pictures that are on display you will find several that are indicated to be re-makes or re-issues." (Opinion, Tr. p. 521)

The Court assessed damages upon the erroneous theory, that if it did not feel the share of defendants' profits due to the infringement were sufficient to compensate plaintiff,

it could add such arbitrary amount as it might deem proper:

“The Court: The general rule of damages is that somebody picks something out of thin air, as a rule, when you leave it to a jury.” (Tr. p. 244)

“I realize that counsel argues that is a speculative question. * * * It is the same thing as a personal injury case. A man may be seriously injured but nobody knows exactly how much he is entitled to receive for his injuries. That is left as a general rule to the good judgment of a jury. They reach out and pick some figure out of the sky and that is the damages and that is all there is to it.” (Tr. p. 480)

“But it is my understanding of the law that if the profits are not sufficient to compensate the plaintiff for his damages, the Court can add such an amount as to compensate him. In other words, if the plaintiff in this case is entitled to recover that recovery is not limited to the profits.” (Tr. p. 479)

“The Court: It may be where that figure (defendants’ profits) is produced in the Court’s mind it will be sufficient, an adequate amount. On the other hand, if the Court should feel it is not the Court will add such an amount to it in the form of damages as it thinks proper.” (Tr. p. 380)

“The Court: I have taken the position, either rightly or wrongly, that if this picture before the infringement had a value and then after the infringement it had no value, the difference would be the actual damages suffered by Mr. Lloyd, which is the common rule of arriving at damages. Now, if Mr. Lloyd is entitled to recover, I feel that \$4,000 would be insufficient compensation.” (Tr. pp. 486, 487)

“The Court: Under Section 25 of the Copyright Act the Court has considerable discretion in those matters. It says as the Court may consider just.” (Tr. p. 83)

The Court was led to make this erroneous construction of Section 25 (that the Court can in its discretion,

make an arbitrary award under the "in lieu of" provision of that section of "such damages as to the Court shall appear to be just", although actual profits are proven) by plaintiff's counsel's argument:

"But we certainly take the position that the plaintiff is entitled to both damages and profits, or, under the authorities, if the Court is of the opinion that under all the circumstances of the case the discretion of the Court should be exercised as to the amount, then statutory damages are proper." (Tr. pp. 168, 169)

"A further matter which has been raised by counsel, which I think could probably be determined by the Ninth Circuit Court of Appeals and perhaps should be, counsel contend that if there are any damages or if there are any profits, that the Court has no discretion to apply the 'in lieu' clause. We take the opposite view." (Tr. p. 248)

However, the Court said at the time of the rendition of its opinion:

"The Court: There are many points that have been brought up and discussed in this case and frankly I haven't too much confidence in my position." (Tr. p. 509)

It having been stipulated that the profits of defendants' picture were \$20,517.28 (Tr. pp. 474-477) the Court found 20 per cent (\$4,103.45) as a reasonable apportionment (following *Sheldon v. Metro-Goldwyn Pictures Corp.*, 309 U. S. 390, 84 Law. Ed. 825, 60 Sup. Ct. 681, in which the Court said this percentage represented the proper apportionment for the entire screen play). In the instant case the Court made no allowance for the fact, as said by the Court "that the part claimed to be infringed upon is only a sequence" (Tr. p. 84). "This sequence was only a part of that picture. There were many other things that went into the making up of that picture" (Tr. p. 473) and it was not the "outstanding sequence"

of the picture (Tr. p. 141). The Court said that it could not accept the figure at which Lloyd "estimated his damages" and "I am not impressed with the claim that the value of the picture has been completely destroyed". The Court having determined that "the profits are not sufficient to compensate the plaintiff", proceeded to "award such an amount to it in the form of damages as it thinks proper" (Tr. pp. 380, 479), without any basis of valuation or computation. While the Court said that the rule of the *Sheldon* case should apply (an award of 20% of defendant's profits) and that it was not the Court's function "to penalize the defendants", the Court nevertheless arbitrarily fixed plaintiff's recovery in the sum of \$40,000 instead of \$4,103.45, upon the mere statement:

"It is my function to try to ascertain an amount that I believe is the actual damage suffered and in arriving at actual damages I base them upon what in my opinion is the lessened value of that copyright. In other words, I believe that in a case of this character the only way that actual damages could be established would be to determine the lessened value of the picture by reason of the infringement. There may be other ways, but that is the method that I have followed in this case. I find and fix the actual damages suffered by Mr. Lloyd in the sum of \$40,000.00, and the additional sum of \$10,000.00 as counsel fee." (Tr. pp. 522, 523)

(d) The Court fixed such damages in the sum of \$40,000 upon the erroneous finding, that defendant Universal "continued to release and distribute and cause to be exhibited to the general public throughout the United States, said motion picture entitled 'So's Your Uncle', with notice and knowledge of plaintiff's rights in the premises and of the continuing infringement upon plaintiff's copyrights and said defendants will continue to infringe upon plaintiff's copyright and upon its motion picture photoplay 'Movie Crazy' unless permanently restrained and enjoined from so doing by order of this Court" (Find. XI, Tr. p. 36); although plaintiff had stip-

ulated that the exhibition of defendants' picture had been stopped upon the receipt of plaintiff's notice of the alleged infringement (Tr. p. 452).

(e) The Court said as to the prior use of the same alleged infringing material in the Columbia picture:

"Expert testimony as to whether it had any effect upon its value will have, as I stated before, very little weight with me because I cannot help but feel every time a sequence is used it simply increases the damages to the Lloyd picture. To argue to me to the contrary is just wasting your time." (Tr. p. 412)

"The Court: I have made myself clear that I feel a showing of that sequence cannot help but cause damage to the original story. To what extent it is damaged is a matter of judgment and unfortunately somebody who does not know anything about the industry has to make that decision." (Tr. p. 466)

"The extent of the showing of that film, it seems to me, would have a tendency to lessen Lloyd's claim against the defendants on that issue." (Tr. p. 345)

(The Columbia picture was exhibited in 7,065 theatres and defendants' picture in only 6,636 theatres [Tr. pp. 90, 391], while an outstanding "A" picture is frequently exhibited in fourteen to fifteen thousand theatres [Tr. p. 260].)

The Court likewise said in its opinion "However, I do feel that the Columbia short has minimized the actual damage suffered by Mr. Lloyd" (Tr. p. 521), yet the Court made no calculation of the damage done by the Columbia picture, in fixing the damage done by defendants' picture in the sum of \$40,000.

IV.

Specification of Errors.

Defendant Universal hereby specifies the following errors upon which it relies for a reversal of the judgment entered in the Court below:

1. The District Court erred in the admission of the testimony of plaintiff's witnesses, as to their opinion of the value of the re-issue and re-make rights of plaintiff's motion picture "Movie Crazy" before and after the release of defendants' motion picture "So's Your Uncle", upon the grounds urged at the trial by objections and motions to strike (Lloyd Tr. pp. 100, 102, 104, 105, 138, 140, 490, 492, 493, 27, 524; Bentel Tr. pp. 198, 202, 490, 492, 493, 27, 524; Landau Tr. pp. 256, 257, 490, 492, 493, 27, 524; Botsford Tr. pp. 457, 460, 462, 490, 492, 493, 27, 524), that such testimony was incompetent, irrelevant and immaterial, that this was not the proper method of proof, that the witnesses were not qualified to give such testimony, that such estimates were merely the speculations, conjectures, guesswork and fiction of the imagination of the witnesses without any facts upon which an opinion could be based, that such alleged damage was not ascertainable or susceptible of proof, and that it was not established that plaintiff suffered any damage.

2. The District Court erred in the rejection of testimony of plaintiff's president, Harold Lloyd, upon examination by defendant's counsel, offered to establish that in the defense of a prior action instituted against plaintiff for infringement in the use by plaintiff of the same type of material in the same type of picture, he had testified that all of plaintiff's pictures consisted of only a secondary story and situation comedy comprising "gags" and "stage business" specially written for the individual personality of the star, as distinguished from pictures based upon famous stage plays and novels, such testimony having been rejected upon the ruling that defendant's counsel having called the witness he could not impeach him (Tr. pp. 365, 366); upon the ground that the witness being an officer of an adverse party he could be called and impeached by defendant, assuming that this meant the impeachment of the witness rather than the eliciting of material facts.

3. The District Court erred in the rejection of testimony of the witness George A. Hirliman, upon examination by defendant's counsel, offered to establish that he had purchased the re-issue rights to one of plaintiff's best known and most successful pictures "Safety Last" for only \$3,500, and that not one exhibitor would take the picture because there was no demand for the re-issue or re-make rights of any picture of this nature, as distinguished from a picture based upon a famous stage play or novel (Tr. pp. 428-430, 460) and thereby refute the prior testimony of plaintiff's president, Harold Lloyd, that such rights had never been sold, licensed or disposed of to any of his pictures and that such rights to both "Movie Crazy" and "Safety Last" were very valuable (Tr. pp. 352-354), such testimony having been rejected upon the ruling that "it is a collateral matter" and "does not mean anything to the Court" (Tr. p. 430); upon the ground that such testimony was properly offered to establish such facts.

4. The District Court erred in finding (Finding VII, Tr. p. 34) that defendant Universal Pictures Co., Inc. and Jean Yarbrough, the producer of its motion picture entitled "So's Your Uncle", were informed and had knowledge that the material in the magician's coat comedy routine in defendant's said picture was copied and misappropriated in its said motion picture from plaintiff's motion picture entitled "Movie Crazy"; that the alleged similarity in the material consisted of more than six "gags" or pieces of "stage business"; that the entire magician's coat comedy routine in defendant's picture represented more than 6 minutes and 1 second of the running time of 63 minutes and 21 seconds of defendant's picture; that the entire magician's coat comedy routine in plaintiff's picture represented more than 11 minutes and 14 seconds of the running time of 65 minutes and 40 seconds of plaintiff's picture, and that the characters, characterization, motivation, treatment, action and sequence of action in defendant's said motion picture were

copied, misappropriated or plagiarized by them from a portion of plaintiff's said motion picture, upon the grounds:

- (a) The alleged infringing material comprises merely "gags" and "stage business", having no dramatic quality and being incapable of copyright protection.
- (b) Considered independently of the story, as a subordinate sequence of events, they are incapable of copyright monopoly.
- (c) They are not an integral part of the general theme, story or plot of plaintiff's work, and being merely comedy accretion to the story and having no functional relationship to its development, are not the subject of copyright protection.
- (d) They are not a structural sequence of plaintiff's story and having no story structure, they are not dramatic works under the purview of the copyright statute.
- (e) Plaintiff's copyright does not cover any particular sequence or combination of "gags" or "stage business".
- (f) They are readily derivable from the public domain, and not subject to copyright protection.
- (g) The theme and story of the two works are radically dissimilar in plot, action, treatment, development and characterization.

5. The District Court erred in finding (Finding VIII, Tr. p. 35) that the exhibition of defendant's motion picture entitled "So's Your Uncle", was in violation of plaintiff's exclusive rights in its copyright upon its motion picture entitled "Movie Crazy", and without permission or license from plaintiff so to do, and with knowledge and notice of plaintiff's rights, and that defendant Universal Pictures Company, Inc. was informed

and had knowledge that it was infringing upon plaintiff's copyright and could have reasonably foreseen said alleged infringements; upon the grounds:

- (a) The same grounds as set forth in subdivisions (a) to (g) inclusive of specification "4".
- (b) In view of the nature of such alleged infringing material, and plaintiff not having exercised any rights to its said motion picture (produced from 1930 to 1932) for a period of ten years, and plaintiff having failed to notify defendant of its alleged claim for a period of over fifteen months after the general release of defendant's said motion picture in the United States, and plaintiff's president Harold Lloyd having admitted that plaintiff had knowledge of the alleged infringement some time prior to the giving of said notice, and plaintiff having failed to prove when knowledge was obtained or excuse such delay, and plaintiff having stipulated that defendant stopped the exhibition of its said motion picture upon the receipt of said notice; defendant Universal Pictures Company, Inc. had the right to assume that plaintiff had abandoned such alleged rights and had consented, acquiesced in and agreed to the use of such material by both Columbia and said defendant, whereby plaintiff is now estopped from asserting said alleged claims against said defendant; and said defendant has shown that it was not aware that it was infringing a copyrighted work, and such alleged infringement could not reasonably have been foreseen.

6. The District Court erred in finding (Findings IX, X, Tr. pp. 35, 36) that plaintiff's rights to re-issue and re-make its said motion picture were damaged and impaired by reason of said alleged infringing acts of de-

fendant Universal Pictures Company, Inc., in the sum of \$40,000 or any part thereof; upon the grounds:

- (a) There was no proof of any damages sustained by plaintiff.
- (b) Plaintiff's alleged damages being incapable of ascertainment and not susceptible of proof, were not the subject of recovery.
- (c) The Court's assessment of damages in said sum being concededly based upon mere speculation and conjecture, and the record being devoid of any facts from which the alleged loss or its amount could be lawfully or rationally inferred, cannot be sustained.
- (d) The speculations and conjectures of plaintiff's president and alleged experts, of the profits that might have been made if plaintiff's picture had ever been re-issued or re-made, without any basis of facts upon which their opinions could be based, cannot support the Court's award of damages.
- (e) While an award of damages may be based upon the lost profits of an established business where it can be determined with reasonable certainty by competent proof what the amount of loss actually was, there can be no recovery of profits of a new and untried venture, because there is no provable data of past business from which the fact that anticipated returns would have been realized can be legally determined.
- (f) The basis of the Court's determination was that the evidence disclosed there is an open market for such rights, while on the contrary the evidence established that there was no open market or market value for such rights to plaintiff's motion picture.
- (g) The unrefuted evidence established that (1) plaintiff had never re-issued or re-made any of its mo-

tion pictures (2) the re-issue or re-make rights had never been sold, licensed or disposed of to any of plaintiff's pictures, except that the re-issue rights were disposed of to its motion picture "Safety Last" for the sum of \$3,500, and no exhibitor would take the picture because there was no demand for old pictures of this nature, and (3) in the entire history of the industry no picture of this nature had ever been re-made, and only one picture had ever been re-issued.

- (h) The Court made such award upon the erroneous assumption that if it felt the share of defendant's profits due to the infringement were insufficient to compensate plaintiff, it could add such arbitrary amount as it might deem proper, without any factual basis of support.
- (i) The Court erroneously construed Section 25 of the Copyright Act, in holding that it could in its discretion make an arbitrary award under the "in lieu of" provision of that Section, "of such damages as to the Court shall appear to be just", without any factual basis and although actual profits were proven.
- (j) The Court's award was made upon the erroneous assumption, that the "general rule of damages is that somebody picks something out of thin air" and "you reach out and pick some figure out of the sky and that is the damages and that is all there is to it."
- (k) The Court should not have made any award to plaintiff, but if such award were made it should have been limited either to the share of defendant's profits due to the infringement, or \$5,000.
- (l) The award in such amount was made upon the erroneous finding (Finding XI, Tr. p. 36) that defendant continued to release and distribute and cause to be exhibited, its said motion picture

throughout the United States, after notice of plaintiff's alleged claim.

- (m) The Court having determined that the damage done by defendant's picture or the Columbia picture entitled "Loco Boy Makes Good", depended entirely upon the extent of the showing of each of said pictures, and the evidence having established that the Columbia picture was exhibited (from the date of its release in 1942 to the date of trial) in more theatres throughout the United States than defendant's picture, there could be no basis for any award of damage done by defendant's picture.

7. The District Court erred in finding (Finding XI, Tr. p. 36) that defendant continued to release and distribute and caused to be exhibited its said motion picture to the general public throughout the United States, after notice of plaintiff's alleged claim, although plaintiff stipulated that such acts were discontinued upon the receipt of notice of plaintiff's alleged claim.

8. The District Court erred in finding (Finding XII, Tr. p. 36) that the profits of defendant Universal Pictures Company, Inc. from its said motion picture exceeds the sum of \$20,500, although plaintiff stipulated that the total amount of such profits was in the sum of \$20,517.28, and in finding that the share of such profits due to the infringement was 20% or \$4,100, instead of only the proportionate part of 20% thereof that such alleged infringing material bore to all of the material in plaintiff's said motion picture.

9. The District Court erred in finding (Finding XIV, Tr. p. 37) that plaintiff should be awarded \$10,000 as attorney's fees; upon the ground that in view of the unsound theories of law advanced by plaintiff, which misled the Court and induced it to make its erroneous determination and award of damages, no award of attorney's fees should be made to plaintiff.

10. The District Court erred in concluding (Conclusion I, Tr. p. 37) that defendant Universal Pictures Company, Inc. infringed upon the copyright on plaintiff's motion picture entitled "Movie Crazy", and that such alleged infringement was knowingly, wilfully and deliberately perpetrated; upon the grounds set forth in the specification of errors "1" to "8" inclusive to the findings of fact.

11. The District Court erred in concluding (Conclusion II, Tr. pp. 37, 38) that plaintiff is entitled to an injunction; upon the grounds set forth in the specifications of errors "1" to "8" inclusive to the findings of fact.

12. The District Court erred in concluding (Conclusion III, Tr. p. 39) that plaintiff is entitled to judgment against defendant Universal Pictures Company, Inc. in the sum of \$40,000 or any part of said sum; upon the grounds set forth in the specifications of errors "1" to "8" inclusive to the findings of fact.

13. The District Court erred in concluding (Conclusion IV, Tr. p. 39), that plaintiff is not entitled to an award of profits; upon the ground that if plaintiff is entitled to any recovery, such recovery should be limited to the share of defendant's profits due to the alleged infringement.

14. The District Court erred in concluding (Conclusion V, Tr. p. 39) that plaintiff is entitled to recover costs, and as part of its costs the sum of \$10,000 attorney's fees; upon the grounds set forth in the specification of error "9" to the findings of fact.

15. The District Court erred in concluding (Conclusion VI, Tr. p. 39) that plaintiff is entitled to recover judgment against defendant Universal Pictures Company, Inc. for plaintiff's costs and disbursements including said sum of \$10,000 attorney's fees; upon the grounds set forth in the specification of error "9" to the findings of fact.

ARGUMENT

I.

To constitute an infringement there must be an appropriation of a substantial and material part of copy-rightable material.

Twentieth Century-Fox Film Corp. v. Stonesifer, 140 Fed. (2d) 579, 582 (Cir. Ct. 9th Cir.).

Eggers v. Sun Sales Corporation, 263 Fed. 373, 374 (Cir. Ct., 2d Cir.).

Dymow v. Bolton, 11 Fed. (2d) 690, 691 (Cir. Ct., 2d Cir.).

Oxford Book Co., Inc. v. College Entrance Book Co., Inc., 98 Fed. (2d) 688, 692 (Cir. Ct., 2d Cir.).

MacDonald v. Du Maurier, 144 Fed. (2d) 696, 699, 700 (Cir. Ct., 2d Cir.).

Chamberlin v. Uris Sales Corporation, 150 Fed. (2d) 512, 513 (Cir. Ct., 2d Cir.).

Becker v. Loew's, Inc., 133 Fed. (2d) 889, 892 (Cir. Ct., 2d Cir.) (cert. den. 319 U. S. 772, 320 U. S. 811).

Roe-Lawton v. Hall E. Roach Studios, 18 Fed. (2d) 126, 727.

Alexander v. Theatre Guild, Inc., 26 Fed. (2d) 741, 742, aff'd 26 Fed. (2d) 742.

Lowenfels v. Nathan, 2 Fed. Supp. 73, 80.

II.

“Gags” and “stage business” having no dramatic quality are incapable of copyright protection.

Copyright Act, Section 1(d) of the Act of March 4, 1909, Ch. 320, 35 Stat. 1075 (17 U. S. C. A., Sec. 1(d)) provides in part:

“To perform or represent the copyrighted work publicly if it be a drama or, if it be a dramatic

work and not reproduced in copies for sale, to vend any manuscript or any record whatsoever thereof; * * *."

Sec. 201.4, sub (b) (4), Title 17, foll. Sec. 53 U. S. C. A., 37 Code of Fed. Reg. Ch. 11 as amend., Rules and Regulations for the Registration of Claims of Copyright, provides in part:

"The designation 'dramatic composition' does not include the following: * * * 'stage business' * * * sleight-of-hand performances * * *."

Corpus Juris, Vol. 13, Copyright and Literary Material, Sec. 108, p. 1026:

"It has been said that, in order for a composition to constitute a 'dramatic composition' within the meaning of that term as used in the copyright law, it is necessary that it should tell some story. Therefore there can be no dramatic copyright in a mere stage dance; in the voice, motion, and postures of the actors; in mere stage business, or 'gags;' * * *'" (citing *Chappell v. Fields*, 210 Fed. 864; *Tate v. Fullbrook* [1908], 1 K. B. 821; *Karno v. Pathe Freres*, [1908], 99 L. T. Rep. N. S. 114, appeal dismissed 100 L. T. Rep. N. S. 260).

The Law of Motion Pictures and the Theatre, by Frohlich and Schwartz (1918), p. 536:

"Generally speaking, stage business, gags, * * * are not copyrightable." (citing *Chappell v. Fields*, 210 Fed. 864; *Barnes v. Mines*, 122 Fed. 480; *Tate v. Fullbrook* [1908], 1 K. B. 821; *Karno v. Pathe Freres* [1908], 99 L. T. Rep. N. S. 114.)

In *Chappell & Co. v. Fields*, *supra*, the Court said, p. 865:

"* * * the voice, motions, and postures of actors and mere stage business may be imitated because they

have no literary quality and cannot be copyrighted (Bloom v. Nixon [C. C.], 125 Fed. 977; Savage v. Hoffman [C. C.], 159 Fed. 584).''

Tate v. Fullbrook [1908], 1 K. B. 821, 822, 830, 833: (Appen., p. 1).

In *Karno v. Pathe Freres* [1908], 99 L. T. Rep. N. S. 114, 117, the Court said, citing and following *Tate v. Fullbrook*, *supra*, that as a vaudeville sketch comprising stage business and "gags" with no sustained dialogue, was not a dramatic work it could not be infringed, although the Court found that one was copied in all essential particulars from the other (Appen., p. 2).

In *Greenwood v. First National*, Copyright Office Bull. No. 20 (1926), 277, 278, the Court said:

"Adverting to the similarity, it is in general rather than of particular, and is to be found in some part of plot, moral, characters and stage 'business' and all of which are old as the drama, common as family life, well known as the nature and failings of humanity, and of prior publication in sundry books. In none of them is any novelty or originality—none of that striking originality which reappearing in a subsequent work may serve to create the *prima facie* case and shift the burden for which plaintiff here contends. Moreover, all of them are 'stock' in the highest degree, of public domain and common property, most simple and primitive (not to say crude) in concept and execution."

Glazer v. Hoffman, 153 Fla. 809, 812, 813 (16 So. (2d) 53) [1943]: (Appen., p. 3).

A. The "gags" and "stage business" comprising the so-called "magician's coat sequence", considered independently from the story as a subordinate sequence of events, are incapable of copyright monopoly.

The decision of this Court in *Harold Lloyd Corporation v. Witwer*, 65 Fed. (2d) 1, 20, 22, 24, 27, is peculiarly applicable, this Court saying: (Appen., p. 4).

Rush v. Oursler, 39 Fed. (2d) 468, 473: (Appen., p. 6).

To the same effect:

Lynch v. Warner Bros. Pictures, Inc., 32 Fed. Supp. 575, 577.

Frankel v. Irwin, 34 F. (2d) 142, 144.

Eichel v. Marcin, 241 Fed. 404, 409.

Underhill v. Belasco, 254 Fed. 838, 842.

Echevarria v. Warner Bros. Pictures, 12 Fed. Supp. 632, 635.

Nichols v. Universal Pictures Corporation, 45 Fed. (2d) 119, 121 (cert. den. 282 U. S. 902) (Cir. Ct., 2d Cir.).

B. Plaintiff's copyright does not cover any particular sequence or combination of "gags" or "stage business".

Barnes v. Miner, 122 Fed. 480, 490, 491:

"Can a person copyright a mere order of events in a play or spectacular representation, the representation being of different scenes and things? 'The copyright of a book describing a new system of stenography does not protect the system when considered simply as a system apart from the language by which it is explained so as to make the illustration by another of the same system in a different book, employing totally different language, an infringement.' "

To the same effect:

Holmes v. Hurst, 174 U. S. 82, 90, 43 Law Ed. 904, 19 Sup. Ct. 606.

Colonial Book Co., Inc. v. Oxford Book Co., Inc., 45 Fed. Supp. 551, 553; aff'd. 135 Fed. (2d) 463 on opinion below.

C. Each of such "gags" or pieces of "stage business" being merely a comedy accretion to the story, is not the subject of copyright protection.

In *Caruthers v. R. K. O. Radio Pictures, Inc.*, 20 Fed. Supp. 906, 907, cited with approval by this Court in *Kustoff v. Chaplin*, 120 Fed. (2d) 551, the Court said:

"The exception to which I refer is the episode in 'The Sooners' of the little negro boy Percy, who, whilst fanning a dinner table to keep away flies, becomes so absorbed in the talk of the diners that by mistake he strikes one of the guests on the side of the head with his fan. This episode becomes to the narrator a mere memory of the faux pas of a little negro who was the son of a good cook. It has no functional relationship whatever to the development of the story of 'The Sooners.'

* * * * *

Even if the defendant had the episode of Isaiah and the cake suggested to it by the episode of Percy and the fan, it would not constitute any basis for a decree in the plaintiff's favor, for the episode of Percy is merely glanced at as a supposedly comic accretion to the story of the manuscript, and is not intrinsic to the development thereof."

D. Having no story structure, they are not dramatic works under the purview of the copyright statute.

In *Corcoran v. Montgomery Ward & Co., Inc.*, 121 Fed. (2d) 572, 574 (cert. den. 314 U. S. 687), this Court said:

"While the poem has action in plenty, it lacks in the form in which it was written certain of the qualities of a dramatic work, notably dialogue and a perceptible plot."

In *Seltzer v. Sunbrock*, 22 Fed. Supp. 621, 628, 629, the Court said to the same effect: (Appen., p. 7).

E. A mere subsection of a plot is not susceptible of copyright.

Dymow v. Bolton, 11 Fed. (2d) 690, 692 (Cir. Ct., 2d Cir.):

“If there was copying (which we do not believe), it was permissible, because this mere subsection of a plot was not susceptible of copyright.”

To the same effect:

Nichols v. Universal Pictures Corporation, 45 Fed. (2d) 119, 121 (cert. den. 282 U. S. 902) (Cir. Ct., 2d Cir.).

Solomon v. R. K. O. Radio Pictures, Inc., 44 Fed. Supp. 780, 782.

III.

The Court's assessment of damages in the sum of \$40,000, being concededly based upon mere speculation and conjecture, and the record being devoid of any facts from which the alleged loss or its amount could lawfully or rationally be inferred, cannot be sustained.

The settled rule of law was enunciated by this Court in *Union Oil Co. of California v. Hunt*, 111 Fed. (2d) 269, 277:

“It is said in the article on ‘Damages,’ in American Jurisprudence:

‘The damages recoverable in any case must be susceptible of ascertainment with a reasonable degree of certainty, or, as the rule is sometimes stated, must be certain both in their nature and in respect of the cause from which they proceed.’ 15 Am. Jur. § 20, page 410.”

In *Horlick's Malted Milk Corporation v. Horluck's, Inc.*, 59 Fed. (2d) 13, 17, this Court approved the fol-

lowing quotation from *Vogue Co. v. Thompson-Hudson Co.*, 300 Fed. 509 (cert. den. 273 U. S. 706):

“The case is peculiarly one where such damage as has occurred, like that which is still in prospect, is incapable of computation. We see no reasonable probability that any substantial damages could be proved and reduced to dollars and cents with that degree of accuracy that is essential in such a case.”

Likewise, in *Electrical Research Products, Inc. v. Gross*, 125 Fed. (2d) 912, 913, this Court cited the following cases in support of its determination, that the “proof did not measure up to the requirement of the rule of damages”:

(1) *Montgomery v. Chicago, B. & Q. R. Co.*, 228 Fed. 616, wherein the Court said at page 620:

“In *Central Coal & Coke Co. v. Hartman*, 111 Fed. 96, 49 C. C. A. 244, this court held that the loss of profits from the destruction or interruption of an established business may be recovered where the plaintiff makes it reasonably certain by competent proof what the amount of his loss actually was, but that the actual damages which will sustain a judgment must be established, not by conjectures or unwarranted estimates of witnesses, but by facts from which their existence is logically and legally inferable. The speculations, guesses, estimates of witnesses, form no better basis of recovery than the speculations of the jury themselves.”

(2) *Broadway Photoplay Company v. World Film Corporation*, 225 N. Y. 104, 107, 110 (121 N. E. 756), in which damages were awarded upon an approximation of the returns that plaintiff would have received from certain motion pictures to be exhibited in its theatre, based upon its returns from other motion pictures in the same theatre, wherein the late Judge Cardozo said: (Appen., p. 8).

In *Bernstein v. Meech*, 130 N. Y. 354, 359 (29 N. E. 255), cited and followed in *Broadway Photoplay Company v. World Film Corporation*, *supra*, in which plaintiff sought to recover prospective profits of a theatrical engagement, the New York Court of Appeals had previously said to the same effect:

“The results which would in that respect have been produced if the company had been permitted to perform the contract were speculative, and by no probative means ascertainable. It is contended on the part of the defendants that recovery could be founded on no other basis, and therefore the plaintiff could recover nominal damages only. The value of the contract to the plaintiff was in the profits, and in the amount of them which may have been realized over his expenses attending its performance. Those profits not being susceptible of proof, were not the subject of recovery.”

In *Cutting v. Miner*, 30 App. Div. 457, 459, 460 (52 N. Y. Supp. 288), in which damages were awarded upon an approximation of the returns that plaintiff would have received from a stage play, based upon prior receipts of other plays in the same theatre, the Court said in citing and following *Bernstein v. Meech*, *supra*: (Appen., p. 9).

In *Wooldridge v. Shea*, 186 App. Div. 705, 709 (175 N. Y. Supp. 130), in which damages were awarded upon an approximation of plaintiff's agreed share of the prospective gross receipts of a theatrical stock company of which plaintiff was the leading lady, based upon prior gross receipts in the same theatre of a theatrical stock company in which plaintiff was likewise the leading lady, the Court said in citing and following *Bernstein v. Meech*, *supra*: (Appen., p. 10).

In *Carnera v. Schmeling*, 236 App. Div. 460, 462 (260 N. Y. Supp. 82), in which plaintiff sought to recover his agreed share of the prospective gate receipts of a boxing

contest for the heavyweight championship, based upon the minimum gate receipts from other heavyweight championship boxing contests, the Court said in citing and following *Broadway Photoplay Company v. World Film Corporation*, *supra*, and *Bernstein v. Meech*, *supra*:

“So far as plaintiff’s proof with respect to his general damages is concerned, we are of opinion that he has failed to present facts from which it may be reasonably inferred that he has suffered damages in any reasonably ascertainable sum. Judicial notice of past profits that have heretofore accrued from boxing contests may not be taken, much less used, as a basis for estimating probable profits from future contests. Plaintiff’s proof tending to support the allegations of his complaint to the effect that he sustained damages in the amount of \$100,000 is wholly speculative and incapable of reasonable ascertainment. (*Bernstein v. Meech*, 130 N. Y. 354; *Broadway Photoplay Co. v. World Film Corp.*, 225 *id.* 107.)”

In *K. & R. Film Company, Inc. v. Brady*, 104 Misc. 667, 669, 671 (172 N. Y. Supp. 268), *aff’d* 188 App. Div. 913 (175 N. Y. Supp. 908), in which plaintiff sought to recover prospective profits of a motion picture, based upon prior receipts of the same motion picture, the late Judge Lehman said, in citing and following *Bernstein v. Meech*, *supra*: (Appen., p. 11).

It is the settled rule of law in the State of California.

County of Los Angeles v. Signal Realty Co., 86 Cal. App. 704, 708 (261 Pac. 536): (Appen., p. 12).

Sanitation Dist. No. 2 v. Averill, 8 Cal. App. (2d) 556, 564, 566 (47 Pac. (2d) 786): (Appen., p. 13).

This settled rule of law has been repeatedly enunciated in the decisions of the other Federal Courts.

In the leading case of *Central Coal & Coke Co. v. Hartman*, 111 Fed. 96, 98, 100, 102, the Court said: (Appen., p. 13).

Seymour v. McCormick, 57 U. S. 480, 489 (14 Law. Ed. 1024) (Patent infringement):

“Actual damages must be actually proved, and cannot be assumed as a legal inference from any facts which amount not to actual proof of the fact. What a patentee ‘would have made, if the infringer had not interfered with his rights,’ is a question of fact and not ‘a judgment of law.’ The question is not what speculatively he may have lost, but what actually he did lose.”

Philip v. Nock, 84 U. S. 460, 462 (21 Law. Ed. 679) (Patent infringement):

“The plaintiff must show his damages by evidence. They must not be left to conjecture by the jury. They must be proved, and not guessed at.”

Dobson v. Hartford Carpet Company, 114 U. S. 439, 444 (29 Law. Ed. 177, 5 Sup. Ct. 945) (Patent infringement):

“The burden is upon the plaintiff, and, if he fails to give the necessary evidence, but resorts, instead, to inference and conjecture and speculation, he must fail for want of proof. * * * There is but one safe rule—to require the actual damages or profits to be established by trustworthy legal proof.”

Cincinnati Siemens-Lungren Gas Illuminating Company v. Western Siemens-Lungren Company, 152 U. S. 200, 204, 205 (38 Law Ed. 411, 14 Sup. Ct. 523) (Breach of contract involving a patent right):

“‘Actual damages must be actually proved, and cannot be assumed as a legal inference from any facts which amount not to actual proof of the fact. What a patentee ‘would have made, if the infringer had not interfered with his rights,’ is a question of fact and not ‘a judgment of law.’ The question is not what

speculatively he may have lost, but what actually he did lose.'

It is true that that was an action for an infringement, and this for a breach of a contract, but still the rule of damages is the same. Actual damages is what the law gave in case of an infringement, *Birdsall v. Coolidge*, 93 U. S. 64; actual damages is all the law gives in case of a breach of contract."

Boston & Albany Railroad Company v. O'Reilly, 158 U. S. 334, 336 (39 Law Ed. 1006, 15 Sup. Ct. 830) (Personal injuries): (Appen., p. 15).

Keough v. Chicago & Northwestern Railway Company, 260 U. S. 156, 164, 165 (67 Law Ed. 183, 43 Sup. Ct. 47) (Anti-trust action):

"Finally, not only does the injury complained of rest on hypothesis (compare *International Harvester Co. v. Kentucky*, 234 U. S. 216, 222-224); but the damages alleged are purely speculative. * * * These damages must be proved by facts from which their existence is logically and legally inferable. They cannot be supplied by conjecture. To make proof of such facts would be impossible in the case before us."

P. P. Mast & Co. v. Superior Drill Co., 154 Fed. 45, 49, 50 (Patent infringement): (Appen., p. 15).

Auto Vacuum Freezer Co., Inc. v. William A. Sexton Co., 250 Fed. 459, 468 (Patent infringement): (Appen., p. 16).

To the same effect:

Muther v. United Shoe Machinery Co., 21 Fed. (2d) 773, 776 (cert. den. 263 U. S. 703) (Patent infringement).

Power Specialty Co. v. Connecticut Light & Power Co., 80 Fed. (2d) 874, 875 (Patent infringement).

A. The speculations and conjectures of plaintiff's president and two alleged experts of the profits of plaintiff or some other motion picture producer might have made if it had ever re-issued or re-made plaintiff's motion picture, without any certain basis of facts, cannot support the Court's award of damages.

Rude v. Wescott, 130 U. S. 152, 167 (32 Law. Ed. 888, 9 Sup. Ct. 463) (Patent infringement): (Appen., p. 17).

Fried, Krupp Aktien-Gesellschaft v. Midvale Steel Co., 191 Fed. 588, 591 (cert. den. 223 U. S. 728) (Patent infringement):

"The absence of actual fact proof is not met by the presence of expert speculations no matter how voluminous."

Chicago Life Ins. Co. v. Tiernan, 263 Fed. 325, 339 (Breach of contract):

"The speculations and conjectures of witnesses, who know no facts from which a reasonably accurate estimate can be made, form no better basis for a judgment than the conjectures of a jury without facts."

Wakeman v. The Wheeler & Wilson Manufacturing Co., 101 N. Y. 205, 217 (4 N. E. 264) (Breach of contract):

"We think the opinions of witnesses as to the value of the agreement, as to the profits which it or any agency established in pursuance of it could produce, as to the damages plaintiffs realized, and as to the number of machines they could have sold, were properly excluded. This was not a case for expert or opinion evidence. There was no certain basis of facts proved, or facts assumed upon which an opinion could be based. * * * The safer rule in all such cases is to exclude opinions and receive the facts."

B. While an award of damages may be based upon the lost profits of an established enterprise where it can be determined with reasonable certainty by competent proof what the amount of loss actually was, there can be no recovery of profits of a new and untried venture because there is no provable data of past business from which the fact that anticipated profits would have been realized can be legally determined.

In *Atchison, T. & S. F. Ry. Co. v. California Sea Products Co.*, 51 Fed. (2d) 466, 468, 469, this Court applied the rule as set forth in the leading case of *Central Coal & Coke Co. v. Hartman*, 111 Fed. 96, 98, as follows: (Appen., p. 17).

There is uniformity of the authorities in the application of this settled rule of damages.

25 C. J. S., Damages, Sec. 42, p. 519:

“Where a new business or enterprise is floated and damages by way of profit are claimed for its interruption or prevention, they will be denied for the reason that such business is an adventure, as distinguished from an established business, and its profits are speculative and remote, existing only in anticipation.” Citing among other cases of various jurisdictions: U. S.—*Greenwood County v. Duke Power Co.*, 107 Fed. (2d) 484, cert. den. 309 U. S. 667 and *Hedrick v. Perry*, 102 Fed. (2d) 802; Cal.—*Forster v. Carouso*, 114 Cal. App. 303 and *Gibson v. Hercules Mfg. & Sales Co.*, 80 Cal. App. 689.

Hedrick v. Perry, *supra*, 806, 807: (Appen., p. 18).

Gibson v. Hercules Mfg. & Sales Co., *supra*, 702-704 (252 Pac. 780): (Appen., p. 19).

California Press Mfg. Co. v. Stafford Packing Company, 192 Cal. 479, 485 (221 Pac. 345): (Appen., p. 21).

Cramer v. Grand Rapids Show Case Co., 223 New York 63, 68, (119 N. E. 227): (Appen., p. 22).

In *Bigelow v. R. K. O. Radio Pictures, Inc.*, 90 Law. Ed. 579, 585, 586 (—U. S.—, October Term, 1945, February 25, 1946), the action was to recover damages under the Sherman and Clayton Acts, for the conspiracy of defendants in preventing plaintiffs from securing first run motion pictures for their established business of conducting a motion picture theatre. The Supreme Court said:

“In such a case, even where the defendant by his own wrong has prevented a more precise computation, the jury may not render a verdict based on speculation or guesswork. But the jury may make a just and reasonable estimate of the damage based on relevant data, and render its verdict accordingly. * * *

* * * * *

The evidence here was ample to support a just and reasonable inference that petitioners were damaged by respondents' action, whose unlawfulness the jury has found, and respondents do not challenge. The comparison of petitioners' receipts before and after respondents' unlawful action impinged on petitioners' business afforded a sufficient basis for the jury's computation of the damage, where the respondents' wrongful action had prevented petitioners from making any more precise proof of the amount of the damage.”

To the same effect:

Greenwood County v. Duke Power Co., *supra*, 488.

Lacy Mfg. Co. v. Gold Crown Co., 52 Cal. App. (2d) 568, 574 (126 Pac. [2d] 644).

Gruppe v. Glick, 26 Adv. Cal. 590, 160 Pac. (2d) 832, 840.

Roseland v. Phister Mfg. Co., 125 Fed. (2d) 417, 420.

Baush Mach. Tool Co. v. Aluminum Co. of America, 79 Fed (2d) 217, 227.

Ellerson v. Grove, 44 Fed. (2d) 495, 499.

C. The evidence did not establish any open market or market value for the re-issue or re-make rights to plaintiff's motion picture.

Muser v. Magone, 155 U. S. 240, 249 (39 Law Ed. 135, 15 Supp. Ct. 77:

“In the matter of *Cliquot's Champagne*, Judge Hoffman defined the market value of goods to be ‘the price at which the owner of the goods, or the producer, holds them for sale; the price at which they are freely offered in the market to all the world; such prices as dealers in the goods are willing to receive, and purchasers are made to pay, when the goods are bought and sold in the ordinary course of trade;’ and the definition was approved by this court. *Cliquot's Champagne*, 3 Wall. 114, 125, 142.”

*Walter v. Duff*y, 287 Fed. 41, 45:

“We start, then, with the fact that we are here dealing with the existence of a market, and a market price evidenced by sales in such market; so that our first and basic inquiry is whether there actually was a market for the sale of this insurance stock. Now, market implies the existence of supply and demand, for without the existence of either factor no market value is shown. Standing alone, offers to sell, with no takers, or offers to buy, with no sellers, show no such concurring willing action of buyer and seller as is involved where a market is made by buyers and sellers who by their respective sales and purchases make a market price which the law takes as evidence of value.”

To the same effect.

Sloan v. Baird, 162 N. Y. 327, 330 (56 N. E. 752).

In *Iron City Toolworks, Ltd. v. Welisch*, 128 Fed. 693, 695, 697, the Court said:

“So, where there is no market price for an article, damages cannot be computed upon the belief of plain-

tiff, or other witnesses, whether more or less probable, that the commodity contracted for, and not delivered, could have been sold for a certain price. Such evidence has not the degree of certainty required by the law, and the hardship that may in particular cases accrue to individual plaintiffs by the exclusion of such testimony, must be weighed against the greater hardship and inconvenience that would result in the administration of justice from the admission of testimony of so vague and indefinite a character. * * *

No facts are adduced in support of plaintiff's opinion. It is hard to imagine a case where profits could be more justly characterized as speculative and uncertain."

D. Statutory damages may be awarded only when neither plaintiff's damages nor defendant's profits are susceptible of proof.

Section 25(b) of the Act of March 4, 1909, Ch. 320, 35 Stat. 1081; August 24, 1912, Ch. 356, 37 Stat. 489 (17 U. S. C. A. Sec. 25 Copyright) provides in part:

"To pay to the copyright proprietor such damages as the copyright proprietor may have suffered due to the infringement, as well as all the profits which the infringer shall have made from such infringement, * * * or in lieu of actual damages and profits such damages as to the court shall appear to be just, and in assessing such damages the court may, in its discretion, allow the amounts as hereinafter stated * * *"

Such statutory damages can only be assessed in the absence of proof of actual profits and damages.

Sheldon v. Metro-Goldwyn Corp., 309 U. S. 390, 399 (84 Law Ed. 825, 60 Sup. Ct. 681).

Douglas v. Cunningham, 294 U. S. 207, 209 (79 Law Ed. 862, 55 Sup. Ct. 365).

Davilla v. Brunswick-Balke Collender Co., 94 Fed. (2d) 567, 568, 570 (cert. den. 304 U. S. 572: (Appen., p. 23).

Jewell-La Salle Realty Company v. Buck, 283 U. S. 202, 206, 207 (75 Law. Ed. 978, 51 Sup. Ct. 407).

Sammons v. Colonial Press, Inc., 126 Fed. (2d) 341, 350.

Washingtonian Publishing Co. v. Pearson, 140 Fed. (2d) 465, 466.

The "in lieu" provision of Sec. 25 (b) of the Copyright Law is a substitute for the general damage provision of Sec. 70 of the Patent Law (R. S. Sec. 4921; March 3, 1897, Ch. 391, Sec. 6, 29 Stat. 694; Feb. 18, 1922, Ch. 58, Sec. 8, 42 Stat. 392) (35 U. S. Sec. 70): (Appen., p. 23).

Widenski v. Shapiro, Bernstein & Co., Inc., 147 Fed. (2d) 909, 911, 912: (Appen., p. 24).

E. The Federal Courts have recognized the impossibility of proving actual damages in an action of this nature.

Westermann Company v. Dispatch Printing Company, 249 U. S. 100, 103, 104 (63 Law. Ed. 499, 39 Sup. Ct. 185):

"The record, while showing that the plaintiff was damaged by the infringing publications, does not show the amount of the damages, a matter which is explained by undisputed testimony to the effect that the damages could not be estimated or stated 'in dollars and cents, or in money.' On this point the Circuit Court of Appeals aptly said: 'The plaintiff's damages rested in the injury to his Morehouse contract, and in the discouragement of and the tendency to destroy his system of business. To make any accurate proof of actual damages was obviously impossible.' "

It was for this reason that Sec. 25 of the Copyright Law, *supra*, was adopted.

Douglas v. Cunningham, 294 U. S. 207, 208, 209 (79 Law Ed. 862, 55 Sup. Ct. 365):

“Testimony was presented with respect to the value of the story, but at the close of the trial the petitioners admitted inability to prove actual damages. * * *

The phraseology of the section was adopted to avoid the strictness of construction incident to a law imposing penalties, and to give the owner of a copyright some recompense for injury done him, in a case where the rules of law render difficult or impossible proof of damages or discovery of profits.”

S. E. Hendricks Co., Inc. v. Thomas Pub. Co., 242 Fed. 37, 41: (Appen., p. 25).

Where, as in the instant case, plaintiff has made no effort to exploit his copyright, no possible loss, expressed in dollars and cents, can be proven.

Sammons v. Colonial Press, Inc., 126 Fed. (2d) 341 (cited with approval by this Court in *Twentieth Century-Fox Film Corporation v. Stonesifer*, 140 Fed. (2d) 579), the Court said (pp. 344, 345):

“It is often difficult, for obvious reasons, to make satisfactory proof of such damages, and the plaintiffs did not attempt to do so in the case at bar.
* * *

Liability of an infringer for profits is thus not by way of rough and ready reparation to the plaintiff for the damages which he is presumed to have suffered from the infringement. * * * Thus the latter may have made no effort to exploit his copyright, in which case it would be apparent that he had not been deprived of a gain he otherwise would have made but for the infringement.”

Likewise in *Dam v. Kirk La Shelle Co.*, 175 Fed. 902, cited and followed in *Sammons v. Colonial Press, Inc.*, *supra*, the Court said at page 908:

“It is manifestly impossible for an author of a book or story which he has never dramatized to show that he has sustained any actual damage by the dramatization and production of a play based upon it.”

F. If it should be determined that the proof adduced by plaintiff established actual damage in any given sum, then the award should not exceed the sum of \$5,000.00.

Sec. 25 (b) of the Copyright Act, *supra*, provides in part:

“and in the case of an infringement of a copyrighted dramatic or dramatico-musical work by a maker of motion pictures and his agencies for distribution thereof to exhibitors, where such infringer shows that he was not aware that he was infringing a copyrighted work, and that such infringement could not reasonably have been foreseen, the entire sum of such damages recoverable * * * shall not exceed the sum of five thousand dollars * * * nor shall the limitation as to the amount of recovery apply to infringements occurring after the actual notice to a defendant, either by service of process in a suit or other written notice served upon him.”

Defendant having established that it was not aware that it was infringing and that such infringement could not have been reasonably foreseen (Tr. pp. 235-238, 310-313, 316, 317, 321-326, 330-332, 335-340), and it having been stipulated that the exhibition of defendant's picture was stopped upon its receipt of notice (Tr. pp. 385-387), even assuming that plaintiff established actual damage such damages should not exceed the sum of \$5,000.

G. The Court's award of damages upon the erroneous theory that plaintiff's president Lloyd, without any qualification or factual basis, could determine the market value of plaintiff's rights and estimate its damage, cannot stand.

The Court said that Lloyd could "testify that 'I have been damaged so much', just like an owner of a piece of property could testify, whether he has any qualifications for it or not, as to what its value is", and that no other testimony was required to establish the returns that plaintiff might have received from the possible sale of such rights, or if plaintiff might itself re-issue or re-make its picture. "I think that you go far enough with this witness when he testifies that they have a market value, you might say, either a story to be sold to others or to re-make or re-vamp them and re-issue them" (Tr. pp. 107, 108).

Johnson v. Levy, 3 Cal. App. 591, 596 (86 Pac. 810):

"The evidence touching damages lacks every element of certainty. It consists solely of the guess or reasons for the guess. Both the direct and cross examinations of the plaintiff, and even this is not supported by data or particulars, demonstrate that he had no personal knowledge upon which to base an estimate, and the information derived from others was of the most general and indefinite character.

It is well settled that such evidence will not support a finding as to damages. (*Hayes v. Windsor*, 130 Cal. 235 (62 Pac. 395)."

To the same effect:

Sussex Land & Live Stock Co. v. Midwest Refining Co., 276 Fed. 932, 944, aff'd 294 Fed. 597.

D'Ole v. Kansas City Star Co., 94 Fed. 840, 841 (Copyright infringement).

Central Coal & Coke Co. v. Hartman, 111 Fed. 96, 98, 100, 102.

H. Damages cannot be awarded as in a personal injury case.

The Court said: "I realize that counsel argues that it is a speculative question. * * * It is the same thing as a personal injury case. A man may be severely injured but nobody knows exactly how much he is entitled to recover for his injuries. That is left as a general rule to the good judgment of a jury. They reach out and pick some figure out of the sky and that is the damages and that is all there is to it." (Tr. p. 480)

In *American Sea Green Slate Co. v. O'Halloran*, 229 Fed. 77, 79, the Court said:

"To recover under the seventh section plaintiffs must show that, as a result of defendants' acts, actual damages were sustained—damages in some amount which is susceptible of expression in figures. These damages must be proved by facts from which their existence is logically and legally inferable—not by conjectures, or estimates. They must not be speculative, remote, or uncertain. As we understand the law, a jury may not merely guess that plaintiff lost \$1,000 or \$10,000 which they might have made, even if they feel reasonably sure that some loss was sustained. They cannot award damage as they do for pain or suffering in an action for personal injuries, or for reputation as they do in a libel suit."

I. Plaintiff having failed to establish any actual damage, the award should be limited to that part of defendant's profits shown to be due to the infringement.

Sheldon v. Metro-Goldwyn Pictures Corp., 309 U. S. 390, 401 (Law Ed. 825, 60 Sup. Ct. 681).

Twentieth Century-Fox Film Corporation v. Stonesifer, 140 Fed. (2d) 579, 583, 584 (Cir. Ct. 9th Cir.).

IV.

The exclusion of the testimony of plaintiff's president Harold Lloyd and the witness George A. Hirleman was erroneous.

The Court excluded the testimony of plaintiff's president, Harold Lloyd, upon the ground that defendant having called him, it could not contradict or impeach him (Tr. pp. 365, 366).

While this Court had said in *Harold Lloyd Corporation v. Witwer*, 65 Fed. (2d) 1, 5 (1933), that a party calling an officer of an adverse party vouches for his credibility, Rule 43(b) Fed. Rules Civ. Proc. (effective January 3, 1938), provides in part:

“A party may call an adverse party or an officer, director, or managing agent of a public or private corporation or of a partnership or association which is an adverse party, and interrogate him by leading questions and contradict and impeach him in all respects as if he had been called by the adverse party.”

The rejected testimony was offered to establish that all of plaintiff's motion pictures consisted of only a secondary story and situation comedy comprising “gags” and “stage business”, specially written for the individual personality of the star, as distinguished from pictures based upon famous stage plays and novels (Tr. pp. 365, 366). In this connection the testimony had established that the personality of Lloyd as a star, at the time of the production of plaintiff's picture “Movie Crazy”, was the drawing power of the picture, and that as Lloyd is not a present-day box office draw, the picture had no re-issue value, and the material was worthless for re-make rights (Tr. pp. 113, 209, 267-269, 274, 425, 428, 433, 434, 437-440, 448).

This distinction has been recognized by the Court in *Sheldon v. Metro-Goldwyn Pictures Corp.*, 309 U. S.

390, 407 (84 Law Ed. 825, 60 Sup. Ct. 681):

“The testimony showed quite clearly that in the creation of profits from the exhibition of a motion picture, the talent and popularity of the ‘motion picture stars’ generally constitutes the main drawing power of the picture, and that this is especially true where the title of the picture is not identified with any well-known play or novel.”

The Court likewise excluded the testimony of the witness, George A. Hirliman, upon the ground that it was a collateral matter and meant nothing to the Court (Tr. pp. 428-430, 460), offered to establish that he had purchased the re-issue rights to one of plaintiff's pictures for only \$3,500 (in contradiction of Lloyd's prior testimony to the contrary) (Tr. pp. 352, 354), but it had no value as not one exhibitor would take the picture because there was no demand for the re-issue or re-make rights of any pictures of this nature, as distinguished from a picture based upon a familiar stage play or novel.

No formal offer of proof is necessary under Rule 43 (c) Fed. Rules Civ. Proc., if the nature of the proposed proof is indicated.

Meaney v. United States, 112 Fed. (2d) 538, 539 (Cir. Ct., 2d Cir.).

The exclusion of the testimony of both witnesses affected the “substantial rights of the parties” under Rule 61 Fed. Rules Civ. Proc.

V.

The evidence having failed to establish and the court having failed to find, the extent to which the use of the same material in the Columbia Picture damaged plaintiff, it could not determine that the subsequent use of the same material in defendant's picture damaged plaintiff in any given sum.

Pennsylvania Railroad Co. v. Chamberlain, 288 U. S. 333, 339 (77 Law Ed. 819, 53 Sup. Ct. 391):

“We, therefore, have a case belonging to that class of cases where proven facts give equal support to each of two inconsistent inferences; in which event, neither of them being established, judgment, as a matter of law, must go against the party upon whom rests the necessity of sustaining one of these inferences as against the other, before he is entitled to recover.”

To the same effect:

Grand Trunk Western R. Co. v. Holstein, 67 Fed. (2d) 780, 782.

Franklin v. Skelly Oil Co., 141 Fed. (2d) 568, 571.

P. F. Collier & Sons Co. v. Hartfeil, 72 Fed. (2d) 625, 630.

Gulf Refining Co. v. Mark C. Walker & Son Co., 124 Fed. (2d) 420, 425, 426 (cert. den. 316 U. S. 682).

Parker v. Gulf Refining Co., 80 Fed. (2d) 795, 796.

VI.

The court's erroneous finding that the exhibition of defendant's picture continued after notice of plaintiff's alleged claim, constitutes reversible error.

To avoid the necessity of such formal proof, plaintiff stipulated upon the trial (Tr. p. 452) that upon receipt of plaintiff's notice of the alleged infringement (March 20, 1945) the exhibition of defendant's picture had been stopped. Yet the Court found to the contrary (Finding XI, Tr. p. 36) that the exhibition of the picture continued after such notice, and the assessment of plaintiff's damage in the sum of \$40,000 was based upon this finding. This constitutes reversible error.

Corpus Juris Secundum, Vol. 5, p. 1189, Sec. 1786, says:

“An erroneous finding on a material fact is ordinarily ground for reversal; and thus the finding of a

material fact contrary to the admission of the parties or to the undisputed evidence, is prejudicial error, and a ground for reversal.”

Capital National Bank v. Smith, 62 Cal. App. (2d) 328, 343 (144 Pac. (2d) 665):

“It has been uniformly held the court may not adopt findings in conflict with stipulated facts. (*Wilson v. Mattei*, 84 Cal. App. 567, 573 [258 P. 453]).”

To the same effect:

The People v. John Gabriel, 57 Cal. App. (2d) 788, 792 (135 Pac. 2d 378).

Carpentier v. Small, 35 Cal. 346, 359.

Henning v. Wuest, 48 Cal. App. 147, 150 (191 Pac. 713).

Wilson v. Mattei, 84 Cal. App. 567, 573 (258 Pac. 453).

Haese v. Heitzeg, 159 Cal. 569, 575 (114 Pac. 816).

The Appellate Court will be bound by the stipulation made by the parties upon the trial.

Fox v. Mutual Ben. Life Ins. Co., 107 Fed. (2d) 715, 720.

VII.

The unexplained delay of fifteen months in the assertion of plaintiff's alleged claim concerning a seasonable product like a motion picture, under a copyright that has been dormant for over ten years, precludes recovery of damages or profits.

Plaintiff had the burden of proving its ignorance of the alleged infringement since December 3, 1943, and when and how knowledge was first obtained:

Window Glass Mach. Co. v. Pittsburgh Plate Glass Co., 284 Fed. 645 (cert. den. 261 U. S. 623) (cited with approval

and followed by this Court in *Gillons v. Shell Co. of California*, 86 Fed. (2d) 600, 610, cert. den. 302 U. S. 689), p. 650:

“When delay in prosecuting a claim is so unusual as to carry with it the appearance of being unreasonable, as in this case, there devolves upon a plaintiff the burden of disclosing the impediments to an earlier action; of showing, if ignorant of his rights, how he had remained in ignorance so long; and of revealing how and when he first came to a knowledge of the matters on which he relies in his bill for relief.”

To the same effect:

Hardt v. Heidweyer, 152 U. S. 547, 558 (38 Law. Ed. 548, 14 Sup. Ct. 671).

Rome Grader & Mfg. Corp. v. J. D. Adams Mfg. Co., 135 Fed. (2d) 617, 619.

A. The extent of the delay is measured by the seasonable nature of an alleged infringing work.

Haas v. Leo Feist, Inc., 234 Fed. 105, 108:

“It must be obvious to every one familiar with equitable principles that it is inequitable for the owner of a copyright, with full notice of an intended infringement, to stand inactive while the proposed infringer spends large sums of money in its exploitation, and to intervene only when his speculation has proved a success. Delay under such circumstances allows the owner to speculate without risk with the other’s money; he cannot possibly lose, and he may win. * * * A few weeks’ delay in the case of a song so ephemeral as this may have the same effect as 16 years, when the publication is a legal encyclopedia in 30 volumes.”

Preston v. Kaw Pipe Line Co., 113 Fed. (2d) 311, 313 (cert. den. 311 U. S. 712):

“A court of equity looks with especial disfavor upon any unnecessary delay in asserting a claim to property that is highly speculative in character.”

B. The rule is peculiarly applicable when plaintiff has not worked its statutory right for many years, coupled with defendant's assumption of a lawful right of use.

Valvoline Oil Co. v. Havoline Oil Co., 211 Fed. 189, 195:

“It must be admitted, even if it were to be held that the defendants infringed complainant's trade-mark, that the question involved is seriously debatable.

* * * No satisfactory explanation is given for the delay, and, during that time, the defendants have spent thousands of dollars to create a valuable asset in the word ‘Havoline’. * * *

But it cannot be equitable for a well-informed merchant with knowledge of a claimed invasion of right, to wait to see how successful his competitor will be and then destroy with the aid of a court decree, much that the competitor has striven for and accomplished—especially in a case where the most that can be said is that the trade-mark infringement is a genuinely debatable question.”

Vacuum Cleaner Co. v. Innovation Electric Co., Inc., 234 Fed. 942, 948, 949:

“Throughout this period defendant was showing its machines at public exhibitions, was working in the open, and, in brief, was notoriously carrying on its business.

* * * * *

While, on the one hand, the infringer takes his chances, yet, on the other, where the questions involved are legitimately debatable, and a defendant furnishes full information, and has built up a business and an organization, the owner of the patent, who has knowledge of an infringement, should not

be permitted to stand idly by and speculate on the accounting, pending the result of litigations which plaintiff selects, and wisely so, because of the desirability of putting the best foot forward first."

To the same effect:

Rome Grader & Machinery Corporation v. J. D.

Adams Mfg. Co., 135 Fed. (2d) 617, 619.

Hitchcock v. Valley Camp Coal Co., 29 Fed. (2d) 426, 427.

Gallihier v. Cadwell, 145 U. S. 368, 372, 373 (36 Law. Ed. 738, 12 Sup. Ct. 873).

Westco-Chippewa Pump Co. v. Delaware Electric & Supply Co., 64 Fed. (2d) 185, 187.

National Geographic Society v. Classified Geographic, 27 Fed. Supp. 655, 662.

C. Such course of action constitutes an equitable estoppel, debarring plaintiff from the recovery of damages or profits.

Pollitzer v. Foster, 59 Fed. (2d) 901, 902, 903:

"The long inaction of the plaintiffs, as indicated above amounted in our view to such laches as to create an equitable estoppel against their claims for damages and an accounting. We understand, of course, that a delay which will serve as an equitable estoppel must be of the character which justifies the belief that there is assurance of immunity from a claim of liability. * * * This course of action is sufficient to raise a bar against an accounting or the recovery of damages for infringement of Truffault."

To the same effect:

Edwin L. Wiegand Co. v. Harold E. Trent Co.,
122 Fed. (2d) 920, 925 (cert. den. 316 U. S.
667).

A. R. Mosler & Co. v. Lurie, 209 Fed. 364, 371.

D. The defense of estoppel need not be affirmatively pleaded where the issue is tried by the express or implied consent of the parties.

The complaint alleged (Par. II, Tr. p. 6):

“That immediately upon discovering the facts concerning said infringements hereinbefore alleged and on or about the 20th day of March, 1945 plaintiff notified defendant in writing to cease and desist further distribution, exhibition or lease of defendant’s said motion picture * * *”

The answer (Par. II, Tr. p. 20) denied said allegations, except that it admits such notice was given on or about March 20, 1945.

Upon the trial defendant’s counsel offered the notice in evidence (Deft’s Ex. G, Tr. pp. 386, 387), with the statement:

“Mr. Abeles: Now, I offer in evidence a communication from Mr. Fendler dated March 20, 1945, to Mr. Nathan J. Blumberg, president of Universal Pictures Company, Inc., which I understand was the first notice of any claim as to this picture Movie Crazy—So’s Your Uncle.

Mr. Fendler: You mean the first written communication from the plaintiff’s attorney?

Mr. Abeles: That is correct.

Mr. Fendler: So stipulated, and it may be received in evidence.

The Clerk: Defendants’ Exhibit G.” (Tr. p. 385)

The complaint having alleged that such notice had been given “immediately upon discovering the facts”, defendant’s counsel interrogated Lloyd as to the date that plaintiff discovered the infringement. When Lloyd contradicted this allegation of the complaint, by the admission that plaintiff acquired such knowledge some time prior to the giving of the notice, it was incumbent upon plaintiff to establish the date such knowledge was acquired (Tr. pp. 152, 153). When plaintiff made no offer of such

proof, or of proof of any prior notice having been given, the notice was offered to establish an estoppel, and was received in evidence for such purpose without objection, and upon plaintiff's counsel's stipulation. The facts of such estoppel having been developed upon the trial, and plaintiff not having objected to the offer of such proof, there was no cause for defendant to amend the pleading to conform to the evidence.

While Rule 8 (c) Fed. Rules Civ. Proc. (effective January 3, 1938) provides that the defense of estoppel should be affirmatively pleaded, Rule 15 (b) provides in part:

“When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. * * *”

Thus in *Haskins v. Roseberry*, 119 Fed. (2d) 803, 804, 805 (cert. den. 314 U. S. 655), this Court said:

“Appellees contend that the answer is broad enough to cover the defenses of estoppel and statute of limitations, and appellant contends to the contrary.

* * * * *

Appellant's only argument regarding appellee's contention that the cause is barred, is that appellees waived the defense by failure to plead it, because Federal Rules of Civil Procedure, rule 8(c), 28 U. S. C. A. following section 723c, requires the statute of limitations to be affirmatively pleaded. Appellees contend that the rule was complied with. We think it unnecessary to decide whether the pleading is sufficient, because Rule 15(b) disposes of the contention in any event. That rule provides in part: (Quoting part of Rule 15(b) quoted above).

* * * * *

We think and hold that the statute above quoted bars the remedy invoked by appellant."

To the same effect:

Vernon Lumber Corp. v. Harcen Const. Co., 155 Fed. (2d) 348, 349 (Cir. Ct., 2d Cir.).
Pearl Assur. Co., Ltd. v. First Liberty National Bank, 140 Fed. (2d) 200, 202 (Cir. Ct., 5th Cir.).
American Casualty Co. of Reading, Pa. v. Morris, 51 Fed. Supp. 889, 896, aff'd 146 Fed. (2d) 208 (Cir. Ct., 4th Cir.).

Conclusion

As to defendant Universal Pictures Co., Inc.:

- (1) The judgment should be reversed and the complaint dismissed, or
- (2) If it should be determined that plaintiff has established actual damage, the damages to be awarded should not exceed the sum of \$5,000, or
- (3) As plaintiff has not established its damage, either its recovery should be limited to 20% of the profits of said defendant (20% of \$20,517.28), to wit, \$4,103.45, or the matter should be referred to a Master to ascertain that portion of said sum of \$4,103.45 due to the use of the particular alleged infringing material.
- (4) There should be no award to plaintiff of attorney's fees.

Respectfully submitted,

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 GUY KNUPP,
 (MITCHELL, SILBERBERG & KNUPP),
 Attorneys for Appellant and
 Cross-Appellee Universal
 Pictures Company, Inc.

APPENDIX

Argument II

(P. 50) *Tate v. Fullbrook* [1908], 1 K. B. 821 :

The facts are stated (p. 822) :

“Each of the pieces, which were termed ‘dramatic sketches’ and were of a very slight character, intended for performance in music-halls, consisted of a dialogue between persons, accompanied by comic ‘business,’ in the one case taking place round a motor car, and in the other in connection with a telescope. In the opinion of the Court of Appeal the dialogue and story, if such it could be called, of the defendant’s piece were in substance wholly different from those of the plaintiff’s, but in respect of certain accessory matters there was a considerable similarity between the pieces. In each piece the number of the dramatis personae was the same, namely, six, and some of the characters were similar—for instance, in each piece there was a boy, supposed to be an Eton boy, a tramp, a knock-kneed street urchin, an athlete, and a policeman. The plaintiff and the defendant themselves performed the principal part in their respective pieces, and the defendant imitated the plaintiff’s make-up and style of acting. There was also a considerable degree of family likeness as regards the comic ‘business’ in the two pieces—for instance, in both pieces one of the effects consisted in a cracker being placed by the street urchin under and exploded by the foot of one of the characters. It was also alleged that expressions were introduced into the defendant’s piece by way of ‘gag’ which had been taken from similar ‘gag’ in the plaintiff’s piece as performed.”

The Court said (pp. 830, 833) :

“The similarities principally relied upon by the plaintiff’s counsel are in respect of matters which

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in my opinion are really no part of the plaintiff's dramatic production. All that we have here is a certain similarity of stage situations and scenic effects, which ought not, in my opinion, to be taken into consideration at all in a case where there is no appreciable similarity between the words of the two productions. * * *

* * * The claim is not really in respect of copyright in the written words, but in respect of matters such as 'gag' and 'stage business,' which cannot be brought within the scope of the Copyright Acts."

(P. 50) *Karno v. Pathe Freres* [1908], 99 L. T. Rep. N. S. 114, 117:

"The general idea of 'fun' and 'ragging,' with plenty of 'business' and a considerable amount of 'gag,' is carried through the piece but there is no connected story or plot capable of being written down in a literary form. The fun (however nonsensical or devoid of real humour it may be) has been remarkably successful in London, in the provinces, and abroad; and, having been brought out at considerable expense, has nevertheless put thousands of pounds into the plaintiff's pocket, and still attracts crowded audiences and provokes roars of laughter wherever and whenever it is produced. Now, what the defendants have done is this: They have manufactured a cinematographic film, photographed from living persons whom they have placed on a stage to act, got up like the plaintiff's players, and these figures, when their pictures are thrown upon the sheet, appear to go through the same antics, the same succession of pranks, and the same scenic 'business' as that portrayed in the plaintiff's sketch, the incidents being presented substantially in the same order and by the same characters. The boy in the Eton suit and his guardian are in the same left-hand lower box and

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do almost exactly the same things, the 'swell' is in the opposite box precisely as in the plaintiff's sketch, the 'turns' come in the same order, the numbers are put up and knocked out on the same right-hand side of the stage and in the same succession, the artistes follow the example of those in 'The Mummie Birds,' and the general get-up is the same throughout. There are, no doubt, some additions and variations, but the parts in which the two pantomimes agree largely exceed those in which they differ. At the request of the parties, and in order the better to judge as to the alleged plagiarisms, I attended a special private performance at the Oxford Music-Hall on the 6th inst., at which the plaintiff's sketch was performed and was followed immediately by the 'living pictures' produced by the film of the cinematograph twice repeated; and I have no hesitation in finding as a fact, whatever the result may be in law, that the one piece is copied in all essential particulars from the other" (The court held that as this vaudeville sketch comprising "stage business" and "gags" with no sustained dialogue, was not a dramatic work, it could not be infringed.)

(P. 50) *Glazer v. Hoffman*, 153 Fla. 809, 812, 813 (16 So. (2d) 53):

"Appellee's performance, as reflected by the record, is substantially, viz.: He opens his performance with an address, professionally known as 'patter.' The address appellee caused to be copyrighted. Subsequent to the 'patter' appellee proceeds to produce various cocktails, coffee, sodas and other drinks from pitchers, shakers, etc., and delivers these several drinks to the members of the audiences. These drinks are taken from 'seemingly' empty shakers and beakers. The mechanical equipment used and necessary for the sleight of hand performance given

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from time to time by the appellee is purchasable in the open market.

The appellant's act or performance consists of the use of similar mechanical equipment. He likewise attempts to deliver an address or professional 'pat-ter' prior to the act or performance. He is able by sleight of hand performance to supply approximately any drink requested by the different members of his audiences. * * *

The appellant points out that the performance of both parties in producing the requested drinks is only a sleight of hand performance; that it has been in existence for many years and is as common as pulling rabbits out of hats or snakes out of pockets. The magician usually wears a frock coat; surrounds himself with attractive female assistants; assumes a serious, wise, and important attitude, but on close analysis the mixed drink performance is the old sleight of hand trick. * * *

* * * * *

The case of *Fuller v. Bemis*, C. C., 50 F. 926, involved an infringement complaint. The act consisted of a stage dance illustrating the poetry of motion by a series of graceful movements, combined with an attractive arrangement of drapery, light and shadows. While the idea may be 'pleasing,' said the Court, it is not such a dramatic composition as to bring it within the meaning of the copyright act. See *Barnes v. Miner*, C. C., 122 F. 480; *Chappell & Co. v. Fields*, 2 Cir., 210 F. 864. We therefore conclude that the plaintiff below failed to bring his act or performance within the terms of the Federal copyright statutes."

(P. 50) *Harold Lloyd Corporation v. Witwer*, 65 Fed. (2d) 1, 20, 22, 24, 27:

"The plaintiff does not state what is new or novel about this plot or sequence of events found by the

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trial court, or about the matter claimed to have been copied or appropriated from the story. * * *

* * * * *

The dramatic and moving picture rights of a copyrighted story do not cover words (cases cited) voice, motions, or postures of actors (cases cited), but an original novel treatment of a theme (cases cited).

* * * * *

The rule is well settled that matters in the public domain are not copyrightable, and we understand that the appellee concedes this and limits her contentions to what she considers the novel features of the story appropriated in the play. On this subject, Weil in his work on the 'Law of Copyright,' states the law as follows:

Section 983: 'It should also be borne steadfastly in mind, that if a work is not entirely original, there is no copyright in the unoriginal part, which will prevent its use, separately, or in combination, with matter not covered by copyright. Hence, of course, any inquiry as to infringement must exclude permissible reproduction of such non-original matter.'

Section 984: 'If, on the other hand, there are truly original thoughts embodied in the work,—not merely in the expression of thought, but in the thought so expressed, then copyright exists in such intellectual creation throughout. The scope of copyright is, then, always measured by the extent of, and nature of, the original work embodied in a creation.'

* * * * *

Weil (sections 185, 186) deals with the effect of a copyright upon dramatization rights, and particularly as to the right to the plot, as follows: 'It is essential to a "dramatic composition." ' said La-combe, J., in the Fuller Case (C. C.), 50 F. 926,

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‘that it should tell some story. * * * The merely mechanical movements by which effects are produced on the stage are not subjects of copyright where they convey no ideas whose arrangement makes up a dramatic composition.’

* * * * *

the scene, considered independently from the story and the play merely as a scene or a subordinate sequence of events, is utterly commonplace and incapable of copyright monopoly. It is immaterial, therefore, whether or not there is copying.”

(P. 51) *Rush v. Oursler*, 39 Fed. (2d) 468, 473:

“When in such a case similarities are found not in the plot or in its dramatic development or in the lines or action of the principal characters, but only in incidental details necessary to the environment or setting, there is no basis upon which to found a charge of plagiarism, and it may usually be said that such material is so unimportant and so trivial that its appropriation by copying, even if shown, would not be a substantial taking of copyrighted material. The unanimous opinion of the Court of Appeals in *Fendler v. Morosco*, 253 N. Y. 281, 171 N. E. 56 (March 18, 1930), is an instructive application of these principles.

* * * It is true that in attempting to bring the audience itself into the dramatic action, and to create and continue the illusion of the occurrence of an actual murder during a theatrical performance, similarities in incidental detail were developed in the re-writing of ‘The Spider.’ These changes undoubtedly heightened and intensified the dramatic effect, and may fairly be assumed to have contributed largely to the success of the play. * * *

* * * it was of such insignificant and unsubstantial importance that it cannot be made the basis of a charge of plagiarism.”

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(P. 52) *Seltzer v. Sunbrock*, 22 Fed. Supp. 621, 628, 629:

“The courts, in determining what constitutes a dramatic composition, have emphatically stated that there must be a story—a thread of consecutively related events—either narrated or presented by dialogue or action or both. *Daly v. Palmer*, 6 Fed. Cas. p. 1132, No. 3,552; *Amdur*, Copyrights, p. 122 et seq. Attempts have been made to extend the protection afforded dramas under the act to other forms of composition spectacular in nature and theatrical in presentation, but lacking the story element. Even in the early days of interpretation of the Copyright Act, however, the distinction between a mere exhibition, spectacle, or arrangement of scenic effects on the one hand, and a true dramatic composition on the other, was well recognized. * * *

* * * Congress, in subsequent amendments to the act, has made provision, in additional classifications, for certain new types of composition, notably motion pictures. But none of these revisions, including the very significant one of 1909—to which detailed reference is made infra—have added anything to the act to change the original definition of a ‘drama’ as enunciated by the courts. New media in which dramas could be presented were recognized. New provisions have sweepingly prohibited unauthorized dramatizations of any kind by any means whatsoever. Section 1(d) as enacted in 1909, 17 U. S. C. A. § 1(d). But there has been no statutory abandonment of any of the fundamentals previously held indispensable to a genuine dramatic composition.

The courts likewise have clung to first principles and have refused to extend the definition of a ‘drama’ to include other forms of composition having no bona fide plot or story.”

*Appendix.***Argument III**

(P. 54) *Broadway Photoplay Company v. World Film Corporation*, 225 N. Y. 104, 107, 110 (121 N. E. 756):

“The plaintiff was permitted to prove its receipts from other pictures, supplied by other producers, before the breach and after. This evidence was received under objection and exception, but subject to motion to strike out. The motion was later made, with adequate statement of the grounds, and an exception was noted to the denial. The point is fairly raised, and we must determine whether it was error to permit the evidence to stand. The plaintiff’s theory is that a jury, analyzing its receipts, would discover uniformities and averages from which the profits of first-run pictures might be approximately measured.

* * * No formula can be framed, regardless of experience, to tell us in advance when approximate certainty may be attained. The rule of damages must give true expression to the realities of life. We do not need to determine what the plaintiff’s rights would be if it were able to establish the uniformities which it asserts. The sufficient answer is that it has failed utterly to establish them. * * * But there is nothing in the evidence to supply a basis for the comparison. No law of averages, no constant or approximate uniformity of returns, can be gathered by induction from the sporadic and varying instances scattered through this record. The pictures of the first run are few in number. They disclose no semblance of equality in their returns when compared with one another. They disclose a like diversity when compared with pictures of later runs. * * * Nothing but guesswork can place the damages at \$4,500 or any other fixed amount.

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* * * The plaintiff was not required to prove its damages to the dollar (*Wakeman v. Wheeler & Wilson Mfg. Co.*, 101 N. Y. 205). It was required, however, to supply some basis of computation (*Bernstein v. Meech*, *supra*; *Todd v. Keene*, 167 Mass. 157; *Cramer v. Grand Rapids Show Case Co.*, 223 N. Y. 63); and this it did not do.

There were other errors of a like nature. Experts were permitted to show their experience in other theatres. * * * The comparison was misleading, and the admission of the evidence erroneous (*Todd v. Keene*, *supra*; *Moss v. Tompkins*, 69 Hun, 288; *affd.* 144 N. Y. 659).''

(P. 55) *Cutting v. Miner*, 30 App. Div. 457, 459, 460 (52 N. Y. Supp. 288):

''There was no evidence in the case to warrant this finding. It was necessarily pure guess work. * * * Whether the play would have succeeded or not was entirely problematical. It had not previously been produced. It might have been a success or it might have been a complete failure. * * * If the performance had been permitted to proceed, and the play had been a success as evidenced by equally large audiences on subsequent occasions, there would have been some reasonable basis for the finding as to the prospective profits for the rest of the week. But here there was no basis at all. There was simply a first-night audience attracted by the production of a new play. * * *

The other evidence was entirely speculative. The defendant, it is said, admitted that the weekly receipts of his theatre were never less than \$2,300. His manager admitted that they sometimes took in as much as \$1,500 in a night, and he also said that Monday nights (it being on a Monday that the audience was dismissed) were 'usually light.' Then, too, the

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defendant told one of the witnesses that the plaintiff would have done a good week's business and that he liked the play and had faith in it. There were various other 'straws' of the same kind. But in all this we find nothing from which the jury could have drawn an inference as to what receipts would probably have been taken in during the week in question. We quite agree with the suggestion that where the defendant's misconduct has rendered the proof of damages difficult the court 'ought not to be too precise and exacting in regard to the evidence upon which to base a claim for damages resulting from loss of future profits' (*Dart v. Laimbeer*, 107 N. Y. 664). The difficulty here is that there are no substantive facts from which the necessary inferences can be drawn. * * * 'The results * * * were,' as said in *Bernstein v. Meech* (*supra*), 'speculative and by no probative means ascertainable.' "

(P. 55) *Wooldridge v. Shea*, 186 App. Div. 705, 709 (175 N. Y. Supp. 130):

"The principal difficulty with the evidence in this case is that it does not show or tend to show, with any degree of certainty, that the enterprise would have been profitable or that there would have been profits in which the plaintiff would have been entitled to share (*Bernstein v. Meech*, 130 N. Y. 354; *Cutting v. Miner*, 30 App. Div. 457; *Moss v. Tompkins*, 69 Hun, 288; *affd.* 144 N. Y. 659; *Todd v. Keene*, 167 Mass. 157; *K. & R. Film Co., Inc., v. Brady*, 104 Misc. Rep. 667).

When it is certain that damages have been sustained, and the only uncertainty is with respect to the amount thereof, such amount may be determined 'approximately upon reasonable conjectures and probable estimates,' but if they are 'so uncertain, contingent and imaginary as to be incapable of ade-

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quate proof, * * * then they cannot be recovered because they cannot be proved.' (Wakeman v. Wheeler & Wilson Mfg. Co., *supra*. See also, Witherbee v. Meyer, 155 N. Y. 446; *Stevens v. Amsinck*, 149 App. Div. 220, 230).''

(P. 56) *K. & R. Film Company, Inc. v. Brady*, 104 Misc. 667, 669, 671 (172 N. Y. Supp. 268) aff'd 188 App. Div. 913 (175 N. Y. Supp. 908):

"There is no doubt in my mind that in a case of this kind loss of profits which the plaintiff would have made is the real measure of the damages which he has suffered. In order, however, to recover such damages the plaintiff is required to prove as part of its case the profits which it has lost. In so far as these profits are purely speculative and not susceptible of proof they are not the subject of recovery. *Bernstein v. Meech*, 130 N. Y. 354.

The amount of profits to be derived from a theatrical or moving picture performance naturally depends upon a great many different conditions, and the proof that is required must be at least sufficient to remove the question of the amount of profits which might have been realized from the realm of speculation to the realm of reason. The success of the production depends partly upon the merits of the production itself and its power of attracting an audience. It also depends, however, upon the amount of the competition which it must meet in any particular locality. It further depends upon the size and attractiveness of the theatre and upon the question of whether the particular production is calculated to attract the particular clientele which is accustomed to go to such theatre and whether the patrons of such theatre would pay the price demanded for the seats in order to see this production. Obviously, ordinarily, it is difficult, if not impossible, for the

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plaintiff to produce proof which would show with any degree of certainty that if the production had been made it would have resulted in any profits, and which would give the jury any basis upon which such profits could be estimated. In the present case the plaintiff has attempted to supply this proof by showing that it produced the film at numerous other theatres within a radius of 250 miles of the city where defendant's theatre is located, and further showed the receipts obtained at such theatres during the production of the film. * * * No case has been cited where any recovery for profits has been permitted upon a refusal to carry out a contract for a theatrical production without proof of actual profits obtained under at least approximately similar conditions. In fact, the only case cited by the respondent where such profits were recovered is an unreported case where apparently the plaintiff was able to show the actual profits realized in that particular theatre during a period of time when the parties were performing the contract which was subsequently breached."

(P. 56) *County of Los Angeles v. Signal Realty Co.*, 86 Cal. App. 704, 708 (261 Pac. 536):

"We think the testimony was properly stricken because it consisted of the witness' speculation and conjecture only. * * * As we have mentioned, it was stipulated between the parties that the testimony of the witness Seelig that the severance damages sustained would amount to \$66,000 was based upon his estimated loss of that amount in rentals during the next thirty-three years by reason of the loss of the land taken. In making this statement the witness was not relating a fact. He did not pretend to do more than tell the court what he believed would result, based upon his knowledge of the past. This was merely an estimate, and his testimony in that

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regard was only conjecture. * * * These elements are proper to be considered, but they must be established if at all by competent evidence and not the mere fanciful guess of any witness as bearing upon severance damages. It is not so much the subject with which the witness Seelig's testimony dealt that is objectionable, but it is its character as being speculative which render it incompetent and irrelevant."

(P. 56) *Sanitation Dist. No. 2 v. Averill*, 8 Cal. App. (2d) 556, 564, 566 (47 Pac. (2d) 786):

"Another ruling of the court, upon which appellant relies for a reversal, is one in which the court struck out certain of the testimony of plaintiff's witness, H. A. Laffler, who duly qualified as an expert, in which he gave it as his opinion that the remaining land of appellant would be depreciated in value in the amount of \$408,630 by reason of the location, maintenance, operation and construction of the sewer in the manner proposed by respondent. * * *

* * * * *

The testimony stricken out was fully as speculative and conjectural as that held inadmissible upon the same grounds in *Coast Counties Gas & Electric Co. v. Miller & Lux, etc.*, 118 Cal. App. 140 (5 Pac. (2d) 34), and *County of Los Angeles v. Signal Realty Co.*, 86 Cal. App. 704 (261 Pac. 536). An award of damages based upon the quoted testimony of the witness Laffler would be a departure from the sound and just rule that damages must be established with reasonable certainty and may not be purely speculative as to amount or remote as to origin."

(P. 56) *Central Coal & Coke Co. v. Hartman*, 111 Fed. 96, 98, 100, 102:

"The only damages claimed in the petition, and the only losses which the plaintiff sought to prove at

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the trial, were the loss of some of the expected profits of his business of buying and selling coal between January 1, 1897 and January 25, 1899. * * * Actual damages only may be secured. Those that are speculative, remote, uncertain, may not form the basis of a lawful judgment. The actual damages which will sustain a judgment must be established, not by conjectures or unwarranted estimates of witnesses, but by facts from which their existences is logically and legally inferable. The speculations, guesses, estimates of witnesses, form no better basis of recovery than the speculations of the jury themselves. Facts must be proved, data must be given which form a rational basis for a reasonably correct estimate of the nature of the legal injury and of the amount of the damages which resulted from it, before a judgment of recovery can be lawfully rendered. These are fundamental principles of the law of damages. * * *

* * * * *

He produced no contracts he had ever made. He named no customer with whom he had ever had a contract, no customer whom he had lost. * * * Here are no facts—no data—from which the number of customers or the amount of custom which he had lost can be lawfully inferred, none which make the amount of the contracts for future delivery which he did not make either reasonably or unreasonably certain, no basis for even a fair conjecture. * * *

Testimony of this character is nothing but conjecture, and it presents no substantial evidence to make certain the profits that were lost, if any. Expected profits are, in their nature, contingent upon many changing circumstances, uncertain and remote at best. They can be recovered only when they are made reasonably certain by the proof of actual facts which present data for a rational estimate of their

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amount. The speculations and conjectures of witnesses who know no facts from which a reasonably accurate estimate can be made form no better basis for a judgment than the conjectures of the jury without facts.”

(P. 58) *Boston & Albany Railroad Company v. O'Reilly*, 158 U. S. 334, 336 (39 Law. Ed. 1006, 15 Sup. Ct. 830):

“Still, the fact remains that the evidence was admitted, although objected to as incompetent, because the profits of the business, as it was proposed to show them, depended upon so many outside matters, and were too remote.

It further appears that, after having been permitted to put in an estimate of what his personal earnings were from participation in the threshing business, and after it appeared that such business had been brought to a close by the sale of the machine and the good will the fall before the accident, the plaintiff was permitted, under objection, to testify that when he sold out he did it with an intention of resuming the business. To resume such a business would, of course, have required the purchase of another plant, and it is equally obvious that the fate of a new venture was merely conjectural. Such evidence is too uncertain to be made the basis of a verdict for damage. * * *”

(P. 58) *P. P. Mast & Co. v. Superior Drill Co.*, 154 Fed. 45, 49, 50:

“The first assignment of error on the appeal of the defendant below is that the Circuit Court erred in finding an arbitrary sum and decreeing its payment by defendant. We think this assignment must be sustained. The court abruptly departed from the orderly course of procedure. The decree did not rest upon any finding by the master, notwithstanding the

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court overruled all exceptions to it. Nor is it supported by any evidence to be found in the record. It was for an arbitrary sum quite distinct from either of the results which the evidence had any tendency to prove, and the court was not at liberty to pronounce a decree at discretion. Neither profits nor damages can be awarded without proof, and that must be something tangible and sufficient to lead to some definite result. We appreciate the embarrassment and difficulties which attend these inquiries, and to which the learned judge referred; but that does not justify a departure from the rules of law governing the subject. *Corporation of New York v. Ransom*, 23 How. (U. S.) 487, 16 L. Ed. 515; *Philip v. Nock*, 17 Wall. (U. S.) 460, 21 L. Ed. 679."

(P. 58) *Auto Vacuum Freezer Co., Inc. v. William A. Sexton Co.*, 250 Fed. 459, 468:

"The difficulty with the master's reasoning is that it is founded on mere speculation. It is not possible for any one to say whether, if defendant had not infringed, it would have taken three or four years to bring the sales up from \$30,000 to \$63,000 on an advertising expense of \$3,000, and with the added complication of an increase of the retail price. * * *

There are many particulars in which the courts are satisfied with reasonable estimates and approximate calculations in ascertaining damages in infringement cases; but in every case, not only must damage be the proximate result of the tort, but there must be some fundamental data upon which it can be estimated. * * * To go beyond that, and hold defendant liable for an increased advertising expense, which, inter alia, has produced increased sales, is to say that damage may be awarded upon the guess of the court, rather than upon evidence."

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(P. 59) *Rude v. Westcott*, 130 U. S. 152, 167 (32 Law. Ed. 888, 9 Sup. Ct. 463):

“Opinions not founded on knowledge were of no value. Conclusions from such opinions were at best mere guesses. By the decision rendered a settled rule of law was violated, that actual, not speculative, damages must be shown, and by clear and definite proof, to warrant a recovery for the infringement of a patent. As was said long ago by this court: ‘Actual damages must be calculated, not imagined; and an arithmetical calculation cannot be made without certain data on which to make it.’ *New York v. Ransom*, 23 How. 487, 488. There was no question in this case of damages arising from lost sales, or injurious competition, for no machines had been manufactured and put on the market by the patentee, or by the complainants, his assignees.”

(P. 60) *Atchison, T. & S. F. Ry. Co. v. California Sea Products Co.*, 51 Fed. (2d) 466, 468, 469:

“The fact that demurrage in analogous cases is allowed on the basis of anticipated profits and that profits are distinctly the fruits of a commercial venture, brings the award of such claims squarely under the rule set forth in the case of *Central Coal & Coke Co. v. Hartman* (C. C. A.) 111 F. 96, 98. There the court said: ‘The anticipated profits of a business are generally so dependent upon numerous and uncertain contingencies that their amount is not susceptible of proof with any reasonable degree of certainty; hence the general rule that the expected profits of a commercial business are too remote, speculative, and uncertain to warrant a judgment for their loss. (Cases cited.) * * * He who is prevented from embarking in a new business can recover no profits, because there are no provable data of past business from which the fact that anticipated profits would

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have been realized can be legally deduced. (Cases cited.)'

The mere addition of the new equipment, the Lansing, to the whaling fleet did not make the business of catching whales 'new' to the appellees, for the latter had had nine years' experience in whaling. But in the light of the record we cannot logically call the venture of fishing for whales in the untried waters off San Clemente Island an established business, the profits of which are reasonably capable of ascertainment. We think it too broad an interpretation of the rule set forth in *The Conqueror* and *Central Coal & Coke* cases, *supra*, to allow for the loss of anticipated profits on the record of the two catches of 1926 and the one in December, 1927. * * *

* * * * *

Holding that the lower court erred in awarding damages to libellant in any sum, in that 'the evidence was too uncertain, speculative and conjectural, to be made the basis of a verdict for damages,' we do not think it necessary to consider the other assignments."

(P. 60) *Hedrick v. Perry*, 102 Fed. (2d) 802, 806, 807:

"The cause of action pleaded in respect to damages was loss of profits on business which would have been earned and received except for the concert of action of Hedrick, Penn, and Penn Company in diverting the business from Perry to Penn Company. Anticipated profits from a business which is contemplated but not established are too remote and speculative to form the basis on which to recover damages for the reason that there are no facts from which the amount of such profits can be determined with the degree of certainty required by law. *Howard v. Stillwell & Bierce Manufacturing Co.*, 139 U. S. 199, 11 S. Ct. 500, 35 L. Ed. 147; *Ellerson v. Grove*, 4 Cir., 44 F. 2d 493; *Milheim v. Baxter*, 46 Colo. 155, 103 P. 376,

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133 Am. St. Rep. 50; Kettering Mercantile Co. v. Sheppard, 19 N. M. 330, 142 P. 1128; California Press Manufacturing Co. v. Stafford Packing Co., 192 Cal. 479, 221 P. 345, 32 A. L. R. 114; Blakiston v. Osgood Panel & Veneer Co., 173 Wash. 435, 23 P. 2d 397."

(P. 60) *Gibson v. Hercules Mfg. & Sales Co.*, 80 Cal. App. 689 (252 Pac. 780):

"The alleged loss of profits relates not to the interruption of the business of a going concern, but is remote, contingent, speculative, existing only in anticipation, without any tangible basis upon which to predicate any loss whatever. The allegation that the plaintiff could have done this and could have done that, if the defendant had done something else, furnishes no facts upon which to predicate a judgment.

* * * Where a new business or enterprise is engaged in, and damages by way of profits are sought for its interruption or prevention, the rule is that they will be denied, for the reason that such business is an adventure as distinguished from an established business, and its profits are speculative and remote, existing only in anticipation (17 Cor. Jur., p. 797, sec. 118; *Shoemaker v. Acker*, 116 Cal. 239, 244 [48 Pac. 62].) The rule is one of necessity. Damages must be certain of ascertainment. If one engaged in a new industry, there are no probable data of past business from which the fact can be legally deduced that anticipated profits would have been realized. (*Central Coal Co. v. Hartman*, 111 Fed. 96, 99 [49 C. C. A. 244].) In *Central Coal Co. v. Hartman*, supra, we find the following: 'He who is prevented from embarking in a new business can recover no profits, because there are no provable data of past business from which the fact that anticipated profits would have been realized can be legally deduced,' citing a number of authorities.

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In 8 Cal. Jur., page 777, the distinction is clearly drawn by the text-writer as to when loss of profits may be allowed. If the business is established and is interrupted, past profits furnish the basis for calculating the damage. If the business is unestablished, such anticipated profits are held to be remote, uncertain, and speculative, on the ground that no satisfactory statement of the loss can be made. To state it in different language: No one can say that any profits would ever have been realized. The rules which we are here stating relative to loss of future profits are also clearly set forth in *Shoemaker v. Acker*, 116 Cal., at pp. 244, 245 (48 Pac. 62). The substance of the holding there is that when the business prevented or interrupted is an established one, a basis for allowing damages is found in the past profits of the concern, but if no business has ever been done, no profits earned, the possibility of proving profits does not exist, and no court can determine whether there would be profits, or whether the prospective business would not rather result in losses. To the same effect is the case of *McConnell v. Water Co.*, 149 Cal. 65, 66 [8 L. R. A. (N. S.) 1171, 85 Pac. 929]. Since the briefs were written in this case, the leading case, *California Press Mfg. Co. v. Stafford Pack. Co.*, above referred to, reported in 192 Cal. 479 (221 Pac. 345), has been re-reported in 32 A. L. R. 114, to which has been appended annotations covering thirty-six pages. On page 126 of the same volume, under the subtitle setting forth the rule of law that no recovery can be had for losses of profits, which are uncertain, speculative, contingent, and conjectural, is collated authorities from nearly every state in the Union, showing an unbroken line of decisions confirming the principle set forth in the case of *California Press Mfg. Co. v. Stafford Pac. Co.*, supra, and on page 153 of the same volume, under the subtitle dealing with the rule relating to antici-

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pated profits of an unestablished business, is also collected a long list of decisions showing the unanimity of courts in upholding such doctrine. The cases collected and appended in the notes to the principal case, reported in 32 A. L. R. 120, are so extensive and so numerous that it is unnecessary to do more than cite the volume and page of said work to show that plaintiff has no cause of action on account of his alleged loss of anticipated profits, based upon unrealized hopes of an unestablished business. Whatever damage he may have suffered, by reason of the acts of the defendants, must be based upon something tangible and not upon future prospects, and there being nothing of that character in the complaint, and nothing in the complaint other than what we have referred to, it follows that the judgment of the trial court should be affirmed, and it is so ordered."

(P. 60) *California Press Mfg. Co. v. Stafford Packing Company*, 192 Cal. 479, 485 (221 Pac. 345):

"As a proposition of law, it is well established that loss of profits growing out of a breach of contract, and resulting to an unestablished business, is of too uncertain a character to constitute a basis for the computation of damages for the breach. (*Kettering v. Sheppard*, 19 N. M. 330 [142 Pac. 1128].) Where a new business or enterprise is engaged in, and damages by way of profits are sought for its interruption or prevention, the rule is that they will be denied, for the reason that such business is an adventure as distinguished from an established business, and its profits are speculative and remote, existing only in anticipation. (17 Cor. Jur., p. 797, sec. 118; *Shoemaker v. Acker*, 116 Cal. 239, 244 [48 Pac. 62].) The rule is one of necessity. Damages must be certain on ascertainment. If one engages in a new in-

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dustry, there are no provable data of past business from which the fact can be legally deduced that anticipated profits would have been realized. (Central Coal Co. v. Hartman, 111 Fed. 96, 99 [49 C. C. A. 244].)''

(P. 60) *Cramer v. Grand Rapids Show Case Co.*, 223 N. Y. 63, 68, 69 (119 N. E. 227):

“The evidence of loss of profits and the submission of that question to the jury by the trial justice was in conflict with the determination of this court in *Witherbee v. Meyer* (155 N. Y. 446) where the rule of damages is fully considered and the case of *Wakeman v. Wheeler & W. Mfg. Co.* (101 N. Y. 205), relied upon by counsel for plaintiffs, distinguished. The reasoning in the *Witherbee* case renders unnecessary additional citations from other jurisdictions or the United States Supreme Court in harmony with that decision.

A distinction exists between the interruption of an established business and a new venture. The owner of an established business may have it in his power to establish with reasonable certainty the amount of capital invested, the monthly and yearly expenses of operating his business, and the daily, monthly or yearly income he derived from it for a long time prior thereto and for the time during which the interruption of which he complains continued, thereby furnishing a reasonably correct estimate of the nature of the legal injury and the amount of damages which resulted therefrom. While evidence of such facts may be admissible they must not be uncertain or problematical (*Dickinson v. Hart*, 142 N. Y. 183). The requirement imposed upon one whose business has been established and interrupted cannot be enforced as to him and made less stringent to one embarking in a new business

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who cannot furnish data of past business from which the fact that anticipated profits would have been realized can be legally deduced.”

(P. 64) *Davilla v. Brunswick-Balke Collender Co.*, 94 Fed. (2d) 567, 568, 570 (cert. den. 304 U. S. 572):

“Whether profits shall be awarded or statutory damages allowed is not a matter of choice with a plaintiff. In *Douglas v. Cunningham*, 294 U. S. 207, 209, 55 S. Ct. 365, 366, 79 L. Ed. 862, the court said: ‘The phraseology of the section was adopted to avoid the strictness of construction incident to a law imposing penalties, and to give the owner of a copyright some recompense for injury done him, in a case where the rules of law render difficult or impossible proof of damages or discovery of profits.’ See *Jewell-LaSalle Realty Co. v. Buck*, 283 U. S. 202, 51 S. Ct. 407, 75 L. Ed. 978; *Hendricks Co. v. Thomas Pub. Co.*, 2 Cir., 242 F. 37.

* * * * *

Since the amount of the sales was sufficiently proved, there was no basis for an award of statutory damages. Such an award should not be based upon the idea of punishment, but depends upon the absence of proof of actual profits and damages. *Turner & Dahnken v. Crowley*, 9 Cir., 252 F. 749, 754; *Westermann Co. v. Dispatch Printing Co.*, 249 U. S. 100, 39 S. Ct. 194, 63 L. Ed. 499.”

(P. 64) Section 70, Patent Law (R. S. Sec. 4921; March 3, 1897, Ch. 391, Sec. 6; 29 Stat. 694; Feb. 18, 1922, Ch. 58, Sec. 8, 42 Stat. 392) (35 U. S. C. Sec. 70):

“If on the proofs it shall appear that the complainant has suffered damage from the infringement or that the defendant has realized profits therefrom to which the complainant is justly entitled,

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but that such damages or profits are not susceptible of calculation and determination with reasonable certainty, the court may, on evidence tending to establish the same, in its discretion, receive opinion or expert testimony, which is hereby declared to be competent and admissible, subject to the general rules of evidence applicable to this character of testimony; and upon such evidence and all other evidence in the record the court may adjudge and decree the payment by the defendant to the complainant of a reasonable sum as profits or general damages for the infringement.”

(P. 64) *Widenski v. Shapiro, Bernstein & Co., Inc.*, 147 Fed. (2d) 909, 911, 912:

“It is indicated in the case last cited and established in *Enterprise Mfg. Co. v. Shakespeare Co.*, 6 Cir. 141 F. 2d 916, 919, and the cases cited therein, that proof of either established or reasonable royalties may be resorted to in patent cases only when the patentee is unable to make satisfactory proof of his actual damage and the actual profits of the infringer. That is to say, a plaintiff in a patent case, if he prevails on the issue of infringement, may recover upon the basis of an established or reasonable royalty only after he has failed to prove satisfactorily his own loss and the infringer’s profits. Thus the royalty rule provides successful plaintiffs in patent suits who have been harmed but cannot prove either their actual damages or the defendant’s actual profits with a means to escape the hollow victory of an award of purely nominal damages. But the Copyright Act itself makes provision for similarly situated plaintiffs in copyright cases in the ‘in lieu’ clause of Sec. 25(b), a provision not found in the corresponding section of the Patent Law (35 U. S. C. A. Sec. 70), and from this

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we conclude that it is a substitute for the established or reasonable royalty rule applied in patent cases.

Moreover, it seems to us highly significant that we have been referred to and have found no case applying the patent rule contended for by the defendant in a copyright case, and that the Supreme Court in the Sheldon case *supra*, refused to sanction the closely analogous contention that damages in a copyright case ought to be the price at which the copyright proprietor had indicated his willingness to sell to the infringer."

(P. 65) *S. E. Hendricks Co., Inc. v. Thomas Pub. Co.*, 242 Fed. 37, 41:

"As is well known, the language of this section is a growth of years, resulting from the efforts of Congress to avoid that strictness of construction which historically attaches to any statute inflicting penalties, and to confer upon an injured copyright owner some pecuniary solace, even when the rules of law render it difficult, if not impossible (as it often is), to prove damages or discover profits. * * *

In *Gross v. Van Dyck Gravure Co.*, 230 Fed. 412, 144 C. C. A. 554, Hand. J., in the trial court held that the duty was by this statute laid upon the court to 'estimate damages' in place of the 'old penalties, * * * but to estimate them within the sums given, without the limitations of usual legal proof. The whole course of copyright laws shows a recognition of the difficulty of making legal proof of damages and in substituting for rigid penalties the discretionary power of the court, we must assume that a plaintiff should not fail for lack of proof.' "

No. 11286

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

UNIVERSAL PICTURES COMPANY, INC., a Delaware Corporation, and CLYDE BRUCKMAN,

Appellants,

vs.

HAROLD LLOYD CORPORATION, a California Corporation,

Appellee.

HAROLD LLOYD CORPORATION, a California Corporation,

Appellant,

vs.

UNIVERSAL PICTURES COMPANY, INC., a Delaware Corporation, and CLYDE BRUCKMAN,

Appellees.

APPELLANT BRUCKMAN'S OPENING BRIEF.

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SUMMARY OF ARGUMENT.

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Plaintiff's comedy routine is not within the provisions of subdivision (d) of Section 1 of the Copyright Act, because it is commonplace, and if it were within the provisions of subdivision (d) of Section 1 there would have been no infringement because the comedy routines were dissimilar and no one could have been deceived.....	37
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(3) A subordinate sequence, not an integral part of the story as a whole, is not protected by copyright.....	39
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No. 11286

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vs.

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Appellees.

APPELLANT BRUCKMAN'S OPENING BRIEF.

Jurisdiction.

Jurisdiction to review the judgment of the court below is conferred by Title 28, Section 225, of the United States Code.

The final judgment of the District Court from which the appeal was taken was entered January 8, 1946. [Tr. p. 43.]

Notice of appeal by defendants was served and filed in the District Court February 6, 1946. [Tr. p. 44.]

Notice of cross-appeal by plaintiff was served and filed February 21, 1946. [Tr. p. 48.]

The District Court had jurisdiction by reason of Section 34 of the Copyright Act (Title 17, Section 34, U. S. C. A.)

Statement of the Case.

Nature of Case.

This action was brought under Section 25 of the Copyright Act to recover actual and in lieu damages and attorney fees, and to obtain an accounting of profits and an injunction by reason of a claimed violation of subdivision (d) of Section 1 of the Copyright Act, consisting of the distribution for exhibition and the exhibition of a photoplay which contained a comedy routine suggested by and patterned after a like routine found in an earlier copyrighted photoplay owned by plaintiff.

The trial court denied in lieu damages and an accounting of profits, but gave judgment for plaintiff in the sum of \$40,000.00 actual damages and \$10,000.00 attorney fees, and granted injunctive relief. [Tr. pp. 42-43.]

The case is before this court on an appeal taken by defendants, and a cross-appeal taken by plaintiff. [Tr. pp. 44, 48.]

Appellants and cross-appellees, Universal Pictures Company, Inc., and Clyde Bruckman, were defendants in the court below. Appellee and cross-appellant, Harold Lloyd Corporation, was plaintiff in the court below. The parties are sometimes referred to by their designations in the court below.

The errors relied on by defendant Bruckman arise out of the trial court's failure to dismiss the action because plaintiff did not produce evidence showing either liability or damage, particularly as to defendant Bruckman.

The Copyright Act.

The "writings" for which copyright may be secured is determined by Section 4 of the Act of 1909, limited by the provisions of Article I, Section 8, of the Constitution. Section 1 of the Act gives distinct and specific monopolies to enumerated copyrighted works, each of which rests on an express clause in the section. Subdivision (a) of Section 1 gives a monopoly of "copy rights," that is the right to multiple copies and sell published works, including books, and photographs. Subdivision (b) of Section 1 gives a monopoly of the right to "make any other version" of the copyrighted work "if it be a literary work." Subdivision (d) of Section 1 gives a monopoly of "play rights" or "stage rights," that is the right "to perform or represent the copyrighted work publicly if it be a drama." Section 5 classifies copyrighted works for the purpose of applications for copyright and the guidance of the Copyright Office. By the amendment of 1912 "(1) Motion-picture photoplays; (m) Motion pictures other than photoplays" are added to the works classified in Section 5. By Section 9, copyright of published works is "secured" by publication and prescribed notice. Section 11 provides for the copyright of works "of which copies are not reproduced for sale." The amendments of 1912 to Section 11 provides for filing "of a title and description, with one print taken from each scene or act, if the work be a motion picture photoplay."

The pertinent provisions of the Copyright Act of 1909 as amended in 1912, the pertinent Rules of the Copyright Office, and a memorandum on the background and legislative history of the Act of 1909 and the 1912 amendments are given in the Appendix.

The Pleadings.

The complaint, filed April 4, 1945, alleged that plaintiff had "produced" * * * an original motion picture photoplay starring Harold Lloyd and entitled 'Movie Crazy,' which constituted copyrightable subject matter, and had obtained a copyright on the same on September 15, 1932, and that during the year 1944 "defendants and each of them infringed upon plaintiff's said copyright by producing and commencing distribution, release and exhibition to the general public * * * of a motion picture photoplay entitled 'So's Your Uncle' which is largely copied from and based upon plaintiff's said copyrighted motion picture photoplay entitled 'Movie Crazy'."

The complaint also alleged that by reason of the infringements plaintiff had been damaged "generally in the sum of \$200,000.00"; and specially in the sum of \$200,000.00 by the destruction of the rights to "re-issue, reproduce and remake" "Movie Crazy"; also, that on March 20, 1945, plaintiff notified defendants to "cease and desist further distribution, exhibition or lease of defendant's said motion picture photoplay entitled 'So's Your Uncle' but * * * defendants have continued to infringe upon plaintiff's said copyright by continuing to release, distribute and exhibit said motion picture to the public"; and also, "defendants have secured for themselves and will secure for themselves in the future benefits, privileges and profits."

The complaint prayed for \$200,000.00 in general damages, \$200,000.00 in special damages, an accounting of profits, injunctive relief, and attorney fees in the sum of \$40,000.00. [Tr. pp. 2-7.]

Defendants filed separate motions for a bill of particulars, in which they asked, among other things, for an order requiring plaintiff to state: "(d) The specific literary material, incidents, episodes, sequences, dialogues, similarities, and publicity values used or embodied in the motion picture photoplay entitled 'So's Your Uncle' and claimed by plaintiff to be copied from or based upon, or largely copied from or based upon, the motion picture photoplay entitled 'Movie Crazy'." [Tr. pp. 8-10; 11-13.]

The motions for a bill of particulars were denied. [Tr. p. 16.]

Defendants filed separate answers in which they denied that plaintiff's motion picture photoplay entitled "Movie Crazy" was an original motion picture photoplay or constituted copyrightable subject matter; denied that they, or either of them, infringed upon plaintiff's copyright; denied that defendant Bruckman had produced, or commenced distribution or release or exhibition of, the photoplay entitled "So's Your Uncle"; denied that plaintiff had been damaged at all; and denied that plaintiff had notified defendant Bruckman to cease and desist further distribution, exhibition, or release of "So's Your Uncle," or that defendant Bruckman had continued to release, distribute, and exhibit "So's Your Uncle."

By way of special defense, both answers set up that the complaint "does not state a claim upon which relief can be granted." [Bruckman's Answer, Tr. pp. 22-26; Universal's Answer, Tr. pp. 17-21.]

Departures From Allegations.

Plaintiff did not undertake to prove its allegation that "So's Your Uncle" "is largely copied from and based upon" "Movie Crazy."

Plaintiff also made no effort to prove that Bruckman had anything to do with the production, distribution, release, or exhibition of "So's Your Uncle."

The Findings.

The Findings follow the complaint, except in the following particulars:

1. It is found that defendants "were fully informed and had full knowledge that that certain sequence * * * constituting the so-called 'magician's coat sequence' * * * was copied and misappropriated by defendants and each of them in that said motion picture photoplay entitled 'So's Your Uncle' from plaintiff's motion picture photoplay entitled 'Movie Crazy' " and that "the characters, characterization, motivation, treatment, action and sequence of action" with regard to the sequence in "So's Your Uncle" "were knowingly, wilfully and deliberately copied, misappropriated, and plagiarized by defendants." [Tr. pp. 34-35.]

2. It is found that defendant Bruckman "was employed by the defendant Universal Pictures Co. Inc. in the capacity of writer and to assist in the writing of a certain motion picture photoplay entitled 'So's Your Uncle'," and that defendant Universal Pictures Co., Inc., alone "produced, distributed, released and exhibited to the general public * * * said motion picture photoplay

entitled 'So's Your Uncle' in violation of plaintiff's exclusive rights in and to its copyright upon said motion picture 'Movie Crazy'"; also, that notice of infringement had been given by plaintiff only to defendant Universal Pictures Company, Inc., and that defendant alone threatened to continue to distribute, release, and exhibit "So's Your Uncle." [Tr. pp. 34-35.]

3. It is found that "plaintiff's rights to re-issue [*i. e.*, reprint from the old negatives, (Tr. p. 36)], and remake [*i. e.*, make a new version of, (Tr. p. 36)], said motion picture photoplay entitled 'Movie Crazy' were substantially damaged and impaired by reason of said infringing acts of defendants." [Tr. p. 36.]

4. It is found that "by reason of said infringements by defendants and each of them upon plaintiff's copyright, * * * plaintiff has been damaged by defendants and each of them in the sum of \$40,000.00." [Tr. p. 35.]

5. It is found that "the total amount of profits realized and derived by defendant Universal Pictures Co. Inc. from the production and distribution of said motion picture photoplay entitled 'So's Your Uncle' exceeds \$20,500.00 but the profits which said defendant Universal Pictures Co. Inc., has received and derived from said infringements upon plaintiff's said copyright is 20% of said profits and no more, to-wit: the sum of \$4,100.00." [Tr. p. 36.]

6. It is found that "a reasonable attorney's fee to be awarded to the plaintiff is the sum of \$10,000.00." [Tr. p. 37.]

The Record.

The record is made up not only of the printed transcript on appeal but also of original exhibits certified to this court, particularly plaintiff's copyrighted photoplay "Movie Crazy" [Pltf. Ex. 4]; the photoplay "So's Your Uncle," produced by defendant Universal Pictures, Inc., in 1943, and distributed in 1944 and 1945 [Defts. Ex. D]; the cutting continuity of "So's Your Uncle" [Pltf. Ex. 3]; the photoplay "Loco Boy Makes Good" produced by Columbia Pictures in 1941 and distributed in 1941-1943 [Defts. Ex. H]; and printed copy of the stage play "Merton of the Movies," consisting of 112 pages, copyrighted in 1922. [Defts. Ex. A.]

There is no substantial conflict in the evidence, indeed little conflict of any kind, except in the opinion evidence as to the damages all of which the court rejected in assessing damages. "Movie Crazy" is a full length Class A picture, which lasts for 65 minutes and 40 seconds. [Tr. p. 384.] "So's Your Uncle" is a Class B picture, shown as a secondary film in double feature houses. It lasts 63 minutes and 21 seconds. [Tr. p. 385.] "Movie Crazy" and "So's Your Uncle" have no points of similarity except with respect to the comedy routines in both pictures, referred to by the court in its findings as "the magician's coat sequence." The comedy routine in "Movie Crazy" consists of a comedian getting into a magician's coat by mistake, and while in the coat performing certain gags and stage business usually associated with magicians. The comedy routine takes 11 minutes and 14 seconds in "Movie Crazy" and only 6 minutes and 1 second in "So's Your Uncle." While the comedy routine in "So's Your Uncle" is similar to the comedy routine in "Movie Crazy"

in some respects, it is dissimilar in other respects. Admittedly, the comedy routine in "So's Your Uncle" was suggested by and patterned after the routine in "Movie Crazy."

The questions presented by the record are: were the defendants, Universal Pictures Company, Inc., and Bruckman, particularly Bruckman, within their rights in borrowing what they did from plaintiff's comedy routine? If they were not, did any damage result from the acts of defendants, particularly from the acts of defendant Bruckman? If so, how much?

Plaintiff's Comedy Routine.

The magician's coat routine is introduced into "Movie Crazy" by having Harold (portrayed by Harold Lloyd), a simple lad ambitious for a career in pictures, gain admission to a swank dinner dance given by Mrs. Kitterman, a movie magnate's wife, through the device of an invitation he gained possession of by mistake. After gaining admission, Harold goes into the men's washroom and hangs his coat up while washing. His coat falls down, and the magician's coat is hung on the hook from which Harold's coat has fallen. After washing, Harold gets into the magician's coat by mistake, and returns to the dining room. His invitation calls for a seat at the table of the hostess. He is shown to the table. He is introduced to the hostess. He asks her to dance. He also dances with a vamp. In the course of the dances, a woman purloins silverware by putting it under her garter, and handkerchiefs, elastics, an egg, a rabbit, birds and mice come out of the magician's coat. The handkerchief trick is played on Mrs. Kitterman. The rabbit and the egg are served by the waiter to a "drunk," to the latter's dis-

comfiture. Birds alight on the hostess and other ladies, and mice run down the back of the hostess and other ladies, to their embarrassment. Water from Harold's boutonniere is squirted at Mrs. Kitterman and another lady, with the result that Harold's face is slapped by the hostess and a glass of water is thrown at the wrong man by the hostess. Finally, a whole army of mice comes out of the magician's coat, to the embarrassment of most of the ladies present. In the resulting melee the magician comes in and reproaches Harold for stealing his coat. Harold's credentials are examined, and he is found to be an imposter and is literally thrown out. [Pltf. Ex. 4, Reels 7, 8.]

Harold Lloyd (who seems to be an *alter ego* of plaintiff) referred to the incidents in the scene as "stage business" and "gags." [Tr. pp. 136, 137.]

Plaintiff's Photoplay.

"Movie Crazy" is built around an unsophisticated country boy who is ambitious to get a motion picture contract, and finally succeeds as the result of a series of disconnected blunders.

Harold writes from his Kansas home to the Planet Film Company in Hollywood, enclosing, by mistake, a photograph of a handsome actor as his own. O'Brien, executive of the Film Company, answers the letter, saying "Very impressed with the picture you sent. If you come to Hollywood I will be glad to give you a test." Harold immediately leaves for Hollywood. In arriving in Los Angeles at the old Santa Fe Depot, by mistake he walks through a set where scenes in a motion picture are being photographed. Vance, an actor, who turns out to

be the villain of the picture, holds Harold up to ridicule. Harold catches a rose thrown by Mary, the heroine of the picture being photographed, who is in Spanish costume and wearing a black wig, mistakenly thinking that the rose is being thrown to him. Harold goes to the studio for a test. He makes many blunders and indulges in much slapstick. He finally gets the test, which is a failure. Harold, however, thinks it is a success. Harold meets Mary out of makeup. He does not recognize her, as she is a blond in real life. She does not know him. More slapstick ensues, including a motor policeman chasing Mary's car with Harold on the running board, the loss of one of Harold's shoes in the gutter, and the changing of clothes by Harold in Mary's apartment. There are numerous scenes in which Harold is made ridiculous, with Mary acting both in her true character and as a Spanish heroine unknown to Harold. Harold calls at Mary's apartment from time to time, mistakenly thinking she has a romantic interest in him. Mary finally sends Harold a note on the back of an engraved invitation to a dinner dance to be given at the Falcon Hotel by Mrs. Kitterman, the wife of the president of the Planet Film Company. Harold reads the invitation but does not see the note. He goes to the dinner dance, thinking he has been invited. He goes to the washroom, and hangs up his coat while washing. By mistake he puts on a magician's coat which is hanging next to his own. The magician's coat comedy routine then takes place. While Harold is sprawled on the steps after being thrown out, Mary arrives and expresses sympathy for him. The episode is not reported to Mr. Kitterman or any of the executives of the company. Later, Harold, by mistake, gets into an old-fashioned water scene being

photographed. He seriously fights with Vance, thinking Vance is taking advantage of Mary. The scene is wrecked, but Mr. Kitterman arrives in time to see a part of it. This is his first knowledge that Harold exists. He hires Harold as an actor, knowing of Harold's blundering into the scene, because Harold has made him laugh and has a funny face. [Pltf. Ex. 4.]

The Alleged Infringing Photoplay.

"So's Your Uncle" is the story of a sophisticated and highly intelligent young dramatist, no longer a boy, who requires financing, and in his search for it finds a charming wife for himself and a rich wife for his uncle.

The principal characters are Stephen Curtis, the dramatist; Joe, Steve's friend and associate in producing Steve's play; Patricia, an attractive and charming New York society girl; Roger, Pat's finance; Minerva, Pat's aunt, a wealthy, but vain and gushing, elderly woman; and John Curtis, Steve's uncle, a financial tycoon.

The action takes place in New York.

The play begins in an empty theater, with Steve, Joe, and others rehearsing the first scene in Steve's play before prospective financial backers. The backers walk out before the scene is completed. As they go out, in comes a person looking for Steve, who has been locked out of his hotel and had his clothes impounded because he was three months in arrears on his rent. Steve naturally thinks the person looking for him is a creditor. By a clever ruse, Steve escapes in his makeup based on a picture of his uncle. On crossing the street, he is run down by Pat, who is with Roger. Steve is not hurt, but he

simulates injury when he hears Pat telling Roger they should take him to the home of Aunt Minerva, with whom Pat resides. Steve does this to get a night's lodging. The next morning Steve, in the makeup of his uncle, meets Aunt Minerva, who falls in love with him. Steve, in the character of his uncle, tells Minerva about his own play. She becomes interested in it, and asks to have the nephew call. Steve calls in his own character. Pat falls in love with him. The rest of the play is made up of farcial situations, in which Steve plays the parts of himself and his uncle, becomes engaged to Pat in his own character, and to Minerva, in the character of his uncle. He keeps both Pat and Minerva deceived to the end, when his uncle puts in an appearance. The uncle reproves Steve. Steve reveals his predicament to the uncle, and tells him that Minerva is a daughter of a famous oil baron. The uncle agrees with Steve to marry Minerva. Steve and the Uncle marry Pat and Minerva. It finally appears that the person suspected by Steve as a creditor was an agent of the uncle seeking Steve to settle a fortune on him. [Pltf. Ex. 3; Defts. Ex. D.]

Comedy Routine in Alleged Infringing Photoplay.

About the middle of "So's Your Uncle," Steve, in the character of his uncle, and Pat, Minerva, and Roger go to a night club. It is necessary for Steve also to appear in his own character. He enlists the aid of Joe, now a waiter at the night club, to get a change of clothes for him. Steve and Joe are next found in the men's lounge. Steve tries to get Joe to change clothes with him, but instead Joe agrees to find Steve other clothes. Joe goes into the men's dressing room and finds a magician putting

doves, rabbits, and other "props" in his coat pocket, and testing a water pistol. While the magician is out of the room, Joe picks up his coat, which Steve dons not by mistake but by the deliberate act of Joe, without knowing, however, that it is a magician's coat, and returns to the night club in his own character. Steve dances with Pat. A string of handkerchiefs, doves, eggs, chickens, rabbits, and mice come out of Steve's coat in practically the same way and in substantially the same sequence that they come out of the coat of Harold. The handkerchief trick is not done with Pat, with whom he is dancing, but with one of the other guests. Steve squirts water which hits not Pat, with whom he is still dancing, but Mrs. Buffington, a friend of Pat, in the face. People in the audience, and not any of Steve's party, are the butt of the magician's tricks. Steve does not have his face slapped. Pat pays no attention to the tricks. Steve and Pat leave the party, Steve's stock with Pat having gone up. Joe gets all the blame, as the magician finds Joe with the coat after Steve has discarded it. Steve gets out free and with flying colors.

The next day Steve meets Joe at the night club, Joe still being employed as a waiter. Steve tells Joe that he has fallen for Pat, and that he intends to go to work, and that he has killed off his uncle. The conversation is heard. In the belief that there has been a homicide which will bring scandal to the night club, both Joe and Steve are thrown out. [Pltf. Ex. 3; Reel 3, p. 5 to Reel 6, p. 6.]

Similarities.

The only similarities in the two routines are in the gags and stage business, and in the order in which they appear.

Dissimilarities.

“Movie Crazy” is slapstick comedy, while “So’s Your Uncle” is true farce.

There is obviously no similarity between the story in “So’s Your Uncle” and the story in “Movie Crazy” insofar as it has a story.

The ages, appearances, and costumes of Steve and Harold, and the dialogues are also altogether different.

The characters of Harold and Steve are likewise altogether different.

Besides being an unsophisticated country boy, Harold is stupid and timid, and has a genius for making mistakes which recoil on him to his own embarrassment and the amusement of the bystanders, with resulting sympathy for himself on the part of the audience.

Steve, besides being a sophisticated and highly intelligent man of the world, is not only self-assured, but brash to a degree. He uses bold and cheeky stratagems by which he emerges master of every situation, to the admiration of the audience.

There is no resemblance between the characters in the two routines, other than Harold and Steve.

In "Movie Crazy" there is no character corresponding to Joe in "So's Your Uncle." The characters, other than Harold, are the movie magnate's wife, a movie executive, and movie actors and actresses, including a vamp, who is featured dancing with Harold. In "So's Your Uncle" the characters, other than Steve, are Joe, who is a foil to Steve; Pat, Minerva, and Roger, who are New York society people; friends of Pat and Minerva; and night club entertainers.

The materials are used to altogether different purposes in the two routines.

In "Movie Crazy" the routine is built entirely around the idea of embarrassment to Harold, and resulting sympathy for him. Harold gains admission to the dinner dance, which is a private party, by mistake. He gets into the magician's coat by mistake. He makes his dancing partner the butt of his gags and stage business. He gets his face slapped. He is unmasked by the magician. The mistake as to the invitation is discovered. Harold is literally thrown out. From beginning to end Harold is under a cloud, is embarrassed by the incidents that occur, and is in jeopardy of the greater embarrassment of being thrown out.

In the "So's Your Uncle" routine, Steve goes to the public night club rightfully. Joe gets the magician's coat, knowing it is a magician's coat. Members of Steve's party are not victims of the gags and stage business. Joe gets the blame. Steve emerges triumphant with increased prestige with Pat.

Public Domain.

PLAINTIFF'S COMEDY ROUTINE.

The magician's coat routine in "Movie Crazy" has no theme of its own, and is not an integral part of the story of "Movie Crazy" as a whole, because it neither furthers nor impedes Harold in getting the picture contract.

The materials used in the magician's coat routine in "Movie Crazy," consisting of getting into the magician's coat by mistake and the gags and stage business performed, are commonplace.

It is true that Bruckman testified that, as far as he knew, getting into the magician's coat by mistake was original with Lloyd [Tr. p. 95], but we ask the court to take judicial notice that the idea of changing clothes goes back to Aesop's fable "The Wolf in Sheep's Clothing," and was exploited over and over again in the plays of the Roman poet Plautus. The idea of conjuring in connection with tablecloths, saddlebags, and other articles of personal property, is familiar to readers of "The Arabian Nights." Magic in connection with garments is developed in old books such as Balzac's "The Wild Ass's Skin," and Baum's "Queen Zixi." There are scores of novels, in any public library of any size, built around characters in other persons' clothes.

As to the gags and stage business used in "Movie Crazy."

Bruckman testified that prior to the release of "Movie Crazy" he had seen many magicians on the vaudeville

stage getting all sorts of things out of clothes, including mice, pigeons, eggs, flags, sausages, flower pots, and collapsible props of all natures; also, that long prior to "Movie Crazy" it was common on the vaudeville stage for comedians to imitate, or pretend to be, magicians, and perform magicians' acts. [Tr. pp. 233, 234.]

Plaintiff stipulated that there is one magician's act in almost every old-time vaudeville series of seven or eight acts, and that the kind of tricks referred to by Bruckman have been done by magicians at night clubs or in other places of amusement. [Tr. p. 234.]

Felix Adler testified relative to the stage business in "Movie Crazy" which involved the squirting of water through the flower in Harold's boutonniere, and a woman picking up a glass of water and throwing it at the wrong person, that he had seen this water trick long prior to 1932 at the Sennett and old Fox lots [Tr. p. 324]; that with reference to the business with knives and forks in the woman's garter as it appeared in "Movie Crazy," he had seen such business on the stage long prior to 1932 [Tr. pp. 323, 324]; and that referring to the stage business in "Movie Crazy" with reference to the fly on the head of the drunken person, and an egg being dropped into his hand and then being smashed by the drunken person on his head to get rid of the fly, he had seen such stage business prior to 1932, and particularly in a two-reeler Mack Sennett Comedy called "Fat Roebuck" [Tr. p. 323]; and referring to the other stage business in "Movie Crazy," for example a string of handkerchiefs, that it was a standard trick, as also were the rabbits, pigeons, eggs, and mice. [Tr. p. 326.]

W. W. Larsen testified that prior to the release of "Movie Crazy" in 1932, magician's acts had been combined with comedy routines in night clubs and hotels and on the stage, and that many times prior to 1932 acts had been performed in which a person who was not a magician, clad in a magician's coat, performed magicians' tricks and stage business; also, that in connection with these acts, things in the nature of magicians' "props" appeared to come out of the magician's coat accidentally; also, that, ever since he could remember, this had been a favored subject of cartoons, and that such props, including rabbits, doves, billiard balls, flags, cards, and eggs, dropped out of a magician's coat; that this was all prior to 1932, and that in such performances a rabbit had frequently been introduced beneath a serving cover, and that he must have done that act himself for twenty years. [Tr. pp. 311, 312.]

On cross-examination of plaintiff's counsel, Mr. Larsen gave further details:

"Q. By Mr. Fendler: I am interested in this secretion of the rabbit in the tray. Will you describe what you have done before audiences in secreting rabbits under a cover on a platter? A. Yes, sir. It is not a tray; it is a cover. I do it with either a cover or a hat.

Q. Now, describe what you do. A. This is not in my regular program. This is when I am working at fiestas in hotels.

Q. All right. A. I will go up to a table and with a deck of cards get one party to select out a card. It is placed face down. Then I will either take a cover or a hat and place it over the card. I tell them if they will think of another card, the

card down here will change into the card they think of. I lift it and sometimes that part of the trick works and sometimes it doesn't. Then you close it in an effort to make another attempt, lift again, and there is a rabbit.

Q. Do you usually use a drunk at a table to try that trick with? A. I have performed before lots of drunks.

Q. I mean do you usually try and select a drunk for a trick like that? A. Well, it is fun to work with a drunk." [Tr. pp. 315-316.]

We also ask the court to take judicial notice of the following from the chapter entitled "George Melies: 'Artificially Arranged Scenes'," in *Rise of the American Film*, by Lewis Jacobs, published in 1939:

"* * * By 1900 he had made over two hundred 'magical, mystical and trick films,' each a minute or two long. Imported into the United States, these unique and amazing movies were immediately singled out by the public and became the most popular of all screen entertainments. So popular were they, and so unmatched, that American manufacturers made copies or 'dupes' and sold them under new names as their own.

Melies' aim in these films was to mystify and startle. His prowess as a magician [he was a professional magician before he turned to making pictures] found curious expression in his earliest efforts: *The Vanishing Lady*, *The Haunted Castle*, *The Laboratory of Mephistopheles*, *A Hypnotist at Work*, *Cagliostro's Mirror*, *The Bewitched Inn*, *Conjuror Making 10 Hats in 60 Seconds*. These films showed people disappearing magically, cut in half,

flying through the air; apparitions taking horrible shapes; animals turning into human beings, and human beings into animals." (P. 23.)

As a matter of fact, plaintiff made no effort to prove more than that the act of Harold in getting into the magician's coat by accident and the "particular combination of gags with the particular sequence of action as finally depicted on the screen of "Movie Crazy" were original. [Tr. pp. 94-95.]

The only witness called was Bruckman, who testified as follows:

"Q. By the Court: Was it old to have somebody get a magician's coat and put it on by mistake? A. No, as far as I know, that was original.

Q. By Mr. Fendler: And the particular combination of gags with the particular sequence of action as finally depicted on the screen of Movie Crazy was original, was it not?

The Court: As far as you know?

A. As far as I know, yes." [Tr. p. 95.]

The only thing in the routine stressed by Lloyd as original was the mistake of Harold getting into the dinner dance.

This appears from the following:

"The Court: I know. But that sequence was brought in when this girl, by mistake, used the other side of an invitation.

The Witness: That is correct.

The Court: So that was cut into the picture through that.

The Witness: That is the way he was brought into the party, yes.

The Court: That was the way that was brought in.

The Witness: That is used because that is a basic comedy idea of a man getting into a place by mistake. *We consider that the more a man is laboring under a misapprehension in getting into some place where he does not belong, that it puts him into a unique comedy situation.*

The Court: Of course, there isn't anything new about that.

The Witness: No, I am not claiming anything new about it. *The new part was that the rebuff was on one side and the invitation was on the other, and he looked at the wrong side. That was the unique part, getting him into the situation.* [Tr. pp. 142-143.] (Italics ours.)

"MOVIE CRAZY" AS A WHOLE.

The incidents in "Movie Crazy" were largely anticipated in "Small Town Idol," "Extra Girl," and "Merton of the Movies."

In "Small Town Idol," a feature length picture done by Mack Sennett prior to 1928, the story was that of "a country bumpkin trying to crash Hollywood and becoming a success in pictures." [Tr. p. 326.]

"Extra Girl" is also a full length feature picture made by Mack Sennett prior to 1928, where "a person gets a screen test by sending the wrong photograph to the studio." [Tr. p. 327.]

In both "Merton of the Movies" (which was copyrighted and produced in 1922) and "Movie Crazy" the boy hero is from a small town. Each fondles photographs and pretends play acting. Each sends a photograph of someone else to Hollywood. Each says he wishes to play at a certain studio because a certain actress is there. Each one is tried out in a small part and fails. In his part, Merton is required to walk over to a table and discover a book, and in his part Harold is required to walk from the truck to a newsstand. Each is given a test, and each thinks it is a success, but later is informed it was a failure. Each has a funny face. Each is given a contract because it is discovered accidentally that he can make people laugh. Each one falls in love with a girl who has befriended him because she felt sorry for him. In "Merton of the Movies" the girl calls herself "Mother" to Merton, and in "Movie Crazy" the girl calls herself "Grandmother" to Harold. [Defs. Ex. A and Pltf. Ex. 4.]

At the time "Movie Crazy" was in preparation, Bruckman and John Gray, another writer working with Lloyd on the picture, felt there was considerable similarity between "Merton of the Movies" and "Movie Crazy." Gray accordingly offered a suggestion for an opening of the picture, showing Harold reading a copy of "Merton of the Movies," closing the book, placing it down, and turning to his father and saying "If Merton could do it, so can I." This suggestion was made to Lloyd, but Lloyd dismissed it. [Tr. pp. 231-232.]

"Movie Crazy" is really little more than a burlesque version of "Merton of the Movies." The characters are all stock figures. There is no theme or thread of story

except as tied up with a disconnected series of gags and stage business making up the comedy routines.

In "Movie Crazy" the principal gags and stage business, other than the magician's coat sequence, relate to the breaking of glass, losing a shoe, and a water fight.

The breaking of glass and shoe items were taken from earlier pictures. [Tr. pp. 239-241.]

As to the water fight, which is the longest comedy sequence and the most important from the standpoint of the story because it resulted in a contract for Harold, we ask the court to take judicial notice of the following quoted from *How Motion Pictures Are Made*, by Homer Croy, published in 1918:

"While the pie was being made to answer comedy purpose in various disguises, it was found that a character falling into water was also a source of amusement to audiences. The water motif appeared in film after film, month after month, even year after year, until finally it was suspected that audiences were no longer aroused risibly beyond their control by the pushing of one comedian into a river or lake by another. Different expediences were tried, and by a careful checking up of the responses of audiences it was found to a calculable certainty what film situations could be relied on to inspire approval. A list of situations that could be depended on for a laugh was in the mind of every director, who employed them at his discretion. The list included:

The hitting of an opponent with a pie.

Falling into water.

A kick; a blow.

A waiter falling down-stairs with a tray of dishes.

Unexpected disaster, such as falling into a man-hole.

Stepping on a lady's train.

Assuming of a woman's clothes." [pp. 217-218.]

As to the rest of the gags in "Movie Crazy."

Adler, who suggested the magician's coat routine to Lloyd (for "Welcome Danger," for which it was first made but not used), testified:

"Q. (Cross-examination by Mr. Fendler): Did you and the other writers in working out this sequence here attempt to arrive at a unique combination of situations and scenes, or were you just trying to do something in the same combination and sequence that it had always appeared to the public before? A. About the same.

Q. But that was your idea? A. Yes.

Q. To have the same combination of scenes and sequence that had appeared previously, is that correct? A. I believe so.

The Court: You did not try to have anything unique?

The Witness: No. The only thing, I remember I suggested the egg. I don't think the egg gag was in there in 1928, and I suggested it in the 1932 version.

Q. By Mr. Fendler: You mean where the drunk hits his forehead with the egg? A. Yes.

The Court: You people did not try to do any original work, is that correct?

The Witness: Well, it is very hard to do a lot of original work.

The Court: I know, but this was not original?

The Witness: This was practically a facsimile to the thing that happened before.

By Mr. Fendler: I mean when you created Welcome Danger did you try and have an original combination of scenes that had not publicly appeared? A. We tried to get a basic angle once in a while. But, after all, it is hard to do, because I don't believe we ever had a story at any time. We were gag men." [Tr. pp. 330-331.]

"Q. By Mr. Fendler: Mr. Adler, did you collaborate with Clyde Bruckman on the writing of a picture at Columbia entitled Loco Boy Makes Good? A. Yes.

Q. Which contains this same sequence? A. I understand it does, but I don't —

Q. All right. Is this the first time that you ever heard about the Columbia picture which was written by you and Bruckman containing the magician's coat sequence throughout the second reel? A. I knew it contained it, but we did not put it in.

Q. Who did? A. I think Julius White put it in, the producer. When we write over there, we write a story and it is hard to recognize it after we get through." [Tr. p. 335.]

"Q. How did you and Julius White arrive at the creation of that particular sequence for your Columbia picture? A. Julius White sees every picture in the world, every comedy picture any place. All the writers in any one field, *it is already common property and it is a lot of exchange of gags. All comedians do it*, Stan Laurel, Laurel and Hardy, *all the comedians do the same gags.*" [Tr. p. 338.] (Italics ours.)

Bruckman's Participation.

At the time "So's Your Uncle" was in preparation by Universal, Bruckman was employed as a gag writer. Bruckman never heard of "So's Your Uncle" until the scenario had been completed. As completed, the scenario had a dance sequence at a night club, in which Steve, the hero, appeared both as his uncle and in his own character. [Tr. pp. 231, 235.] Mr. Yarbrough, the producer, handed Bruckman the scenario, saying he needed some comedy in the dance sequence. [Tr. p. 236.] He did not tell Bruckman what comedy material to introduce. [Tr. p. 236.] Bruckman typed up comedy material consisting of stage business connected with the magician's coat sequence, which later appeared in the picture as released. [Tr. p. 229.] He brought this to Yarbrough's attention, telling Yarbrough that Felix Adler and himself had used similar material in a Columbia picture entitled "Loco Boy Makes Good" in 1941, and "at that time it had been suggested by and patterned on the routine as done in Movie Crazy by Harold Lloyd." [Tr. pp. 237, 96.] Yarbrough handed the typewritten material prepared by Bruckman to Maurice Leo, its scenario writer, for inclusion in the scenario. [Tr. p. 229.] Asked by plaintiff's counsel as to his conversation with Yarbrough, Leo testified, "The substance was that he brought this material, telling me a friend had given it to him, who had used it in a picture at one time, and he thought it would work very well into our night club sequence; and he gave it to me and I looked at it and, if I am not mistaken, I was not too enthusiastic over it because I thought it was dated and old-fashioned; but he seemed to think that, despite that fact, he wanted to use it and he was the producer and so I used it." [Tr. p. 221.]

Bruckman was in the employ of plaintiff at the time "Movie Crazy" was made, and, together with Felix Adler and others, he worked on the magician's coat routine. As already stated, Adler had originally suggested the sequence for "Welcome Danger," an earlier Lloyd picture. It was made for that picture, but edited out. It was remade for "Movie Crazy." [Tr. pp. 232, 233.]

Bruckman testified that since prior to the time of his employment by the Harold Lloyd Corporation, during that time, and all times afterward, including the time he was employed at Universal, it was common practice to use comedy routines which had been used before, and to advise the directors of the source and origin, and that practice was followed between Bruckman and Harold Lloyd in behalf of Harold Lloyd Corporation during the term of Bruckman's employment by the Lloyd Corporation. [Tr. p. 238.]

Damages.

Lloyd played the leading role in "Movie Crazy." In fact, without Lloyd there would have been no picture at all. On the other hand, the leading role in "So's Your Uncle" was played by an unknown actor. The only player in "So's Your Uncle" with any box office appeal was Billie Burke, who played Minerva. [Tr. pp. 269, 271.]

Plaintiff released "Movie Crazy" in 1932, and exhibited it for three or four years. [Tr. p. 134.] It was then withdrawn from circulation, and has not been shown since. It grossed \$1,439,182.21. The production cost was \$652,853.26. The distribution cost was \$414,010.14. The net returns were \$372,318.81. [Tr. pp. 178, 179.] Columbia released "Loco Boy Makes Good" in 1942. It was shown over a period of 162 weeks in 7065 theaters.

[Tr. pp. 390, 391.] Universal released "So's Your Uncle" in December, 1943. It was exhibited until April 26, 1945, when it was withdrawn. It was shown in 6636 theaters, many of them the same theaters in which "Loco Boy Makes Good" was shown, and all, or practically all, of them were of the same character. [Tr. p. 82.] It grossed \$208,812.92. The production cost was \$133,874.50. The distribution cost was \$54,421.14. The net returns were \$20,517.28. [Tr. pp. 476, 477.]

For over a year and three months, while the distribution and exhibition of "So's Your Uncle" was taking place, plaintiff, its officers or agents, made no claim that such distribution and exhibition were in any respect injurious to plaintiff. [Tr. p. 385.]

There had been a brisk business in the reissue of old pictures, particularly during the war, but there was no market. Each transaction was the result of bargaining and bickering. [Tr. pp. 434, 436.] Many old pictures have been remade, but no picture of the character of "Movie Crazy" (that is to say, a picture which was not a true comedy, but merely made up of comedy situations) except a single picture that was remade by the owner and released the night before the final day of the trial. [Tr. pp. 448, 354.]

Plaintiff has never sold, or offered for sale, or received a bid upon, any of the pictures owned by it, including "Movie Crazy." [Tr. p. 136.]

No evidence was offered that any one ever attended "Movie Crazy" because of the magician's coat routine or that at the present time any one remembered the routine.

The trial judge, however, undertook to supply this deficiency in the evidence in his opinion from the bench, in which he said:

“I find that that is about the only sequence that people who saw the picture in days gone by remembered. When you ask a person: ‘Have you seen the picture?’ they say, ‘I don’t remember it.’ And then you tell them about this sequence and then they start to tell you about it and it is a matter of more or less common knowledge that that was an outstanding sequence.” [Tr. pp. 521-522.]

Between 1932 and 1938 Harold Lloyd played in only two to four pictures. He did not remember the exact number. Since 1938 he has not played in any pictures that have been exhibited to the public. In 1945 he was no longer regarded as a star, and had no box office appeal. [Tr. p. 428.] He reluctantly admitted to being fifty-one years old [Tr. pp. 111, 112], and it is at least doubtful whether he could still play the comical youthful pranks and antics that made up “Movie Crazy.”

James Geller (who was in the employ of Universal and for three years had been chief story editor of Warner Bros., handling all writers and the selection of materials, and had theretofore been in the agency business handling writers and material for a period of eight or nine years, and had theretofore been on the staff of a New York newspaper, and a writer and author contributing to magazines) testified that “Movie Crazy” could be reissued only as a museum piece. [Tr. p. 267.] There was other testimony to the same effect. [Tr. p. 448.]

Mr. Geller also testified:

"The basic feature of *Movie Crazy* has been done a number of times, where you have a yokel come to Hollywood to get in motion pictures. It was done in Harry Leon Wilson's play *Merton of the Movies*; and it has been done in a series of pictures—one crashing Hollywood. There is nothing novel or essentially novel about it. It has passed its vogue. * * * I think it is like styles; it has gone out of fashion." [Tr. p. 268.]

Plaintiff was permitted, over defendants' objections, to call expert witnesses as to damages. [Tr. p. 102.]

Plaintiff called Harold Lloyd, Arthur M. Landau, and A. M. Botsford.

Lloyd and Landau testified that the reissue and remake rights of "Movie Crazy" had not been damaged at all by "Loco Boy Makes Good." [Tr. pp. 400, 374.] Botsford testified that the reissue and remake rights of "Movie Crazy" had been damaged by "Loco Boy Makes Good," but the damage was negligible. [Tr. pp. 464, 465.]

The court concluded, however, that "Movie Crazy" had been substantially damaged by "Loco Boy Makes Good." [Tr. p. 521.]

Lloyd testified that in his opinion the reissue rights of "Movie Crazy" were worth \$100,000.00 and \$200,000.00, inhibition of "So's Your Uncle," and that the remake rights of "Movie Crazy" were worth \$200,000.00 or more prior to the exhibition of "So's Your Uncle," and that after the exhibition of "So's Your Uncle" the value

of these rights was "practically destroyed." [Tr. pp. 104, 105.]

Landau testified that the reissue and remake rights of "Movie Crazy" were worth \$100,000.00 and \$200,000.00, respectively, prior to the exhibition of "So's Your Uncle," and practically nothing thereafter. [Tr. p. 257.]

Botsford testified that in his opinion the reissue rights of "Movie Crazy" were worth "somewhere around \$100,000.00" prior to the exhibition of "So's Your Uncle" [Tr. p. 462], and the remake rights of "Movie Crazy" were worth "along about \$125,000.00 or \$150,000.00" prior to the exhibition of "So's Your Uncle" [Tr. p. 467], and both the reissue and remake rights were worth practically nothing after the exhibition of "So's Your Uncle." [Tr. p. 467.]

The only reason given by Lloyd for his opinions relative to the value of the reissue and remake rights of "Movie Crazy" and their destruction by the exhibition of "So's Your Uncle" was that "Movie Crazy" could no longer be made with the magician's coat routine, and if it were made with the magician's coat routine people would probably think he was an imitator, and that because of the showing of the routine sequence in "So's Your Uncle" people probably would not care to see "Movie Crazy." [Tr. p. 150.]

The only explanation given by Landau for his opinions on the same subjects was that he assumed the exhibitors would not care to buy "Movie Crazy" after the exhibition of "So's Your Uncle." [Tr. p. 258.]

Botsford gave no reason for his opinions on the subject in question. [Tr. pp. 453, 470, 477-478.]

None of plaintiff's witnesses undertook to state, or even estimate on a theoretical basis, what the gross returns would be on the reissue or remake of "Movie Crazy," or what the distribution costs would be on a reissue, or the production and distribution costs on a remake.

Defendants called expert witnesses in response to those called by plaintiff. These witnesses testified that in their opinions the reissue or remake rights of "Movie Crazy" had not been damaged at all by "So's Your Uncle." [Tr. pp. 268, 298.]

In fixing damages, the trial court said:

"Mr. Lloyd testified, I believe, that he estimated his damages at \$300,000.00. I cannot accept that figure. I do not believe that the reissue value of a picture that originally cost \$650,000 or thereabouts, is worth fifty per cent of its original cost after the lapse of time involved here. Similarly I am not impressed with the claim that the value of the picture has been completely destroyed. I feel that that picture still has and will continue to have certain value after a lapse of a reasonable length of time. * * *

"* * * It is my function to try to ascertain an amount that I believe is the actual damage suffered and in arriving at actual damages I base them upon what in my opinion is the lessened value of that copyright. In other words, I believe that in a case of this character the only way that actual damages could be established would be to determine the lessened value of the picture by reason of the infringement. There may be other ways, but that is the method that I have followed in this case. I find and fix the actual damages suffered by Mr. Lloyd in the sum of \$40,000.00." [Tr. p. 522.]

The finding as to damages was “that plaintiff’s *rights to reissue and remake* said motion picture photoplay entitled ‘Movie Crazy’ were substantially damaged and impaired by reason of said infringing acts of defendants but that the extent to which said rights were impaired and damaged did not and does not exceed the sum of \$40,000.00.” [Tr. p. 36.] (Italics ours.)

Specifications of Error.

1. Plaintiff’s complaint does not, nor does any count therein, state facts sufficient to constitute a cause of action or to entitle it to relief.
2. The court erred in not entering a judgment of dismissal.
3. The court’s findings of fact are not supported by the evidence, and are insufficient to support the judgment.
4. The court’s judgment is contrary to law.
5. The evidence shows that plaintiff’s motion picture photoplay entitled “Movie Crazy,” particularly the portion thereof referred to as the magician’s coat sequence or comedy routine, was not entitled to protection under the copyright laws of the United States, in particular subdivision (d) of Section 1 of the Copyright Act, because said motion picture, as well as all of the portion thereof specifically referred to, was not original but was commonplace, and said sequence or comedy routine was not an integral part of the story of “Movie Crazy.”

6. The evidence shows that plaintiff's motion picture photoplay entitled "Movie Crazy," particularly the portion thereof referred to as the magician's coat sequence or comedy routine, was not entitled to protection under the copyright law of the United States, particularly subdivision (d) of Section 1 of the Copyright Act, as a drama or dramatic composition, because said motion picture, as well as the portion thereof specially referred to, consisted of entertainment other than drama or dramatic composition.

7. The evidence shows that the portion of plaintiff's motion picture photoplay entitled "Movie Crazy" referred to as the magician's coat sequence or comedy routine was not infringed by the motion picture photoplay "So's Your Uncle," because any of the matter embraced in the motion picture photoplay "So's Your Uncle" that is found in said sequence and comedy routine is commonplace and was used differently in "So's Your Uncle" as to characters, characterization, motivation, treatment, action and/or sequence of action.

8. The court's finding that the so-called magician's coat sequence was copied and misappropriated by defendant Bruckman in defendant Universal Pictures Company, Inc., motion picture photoplay entitled "So's Your Uncle" from plaintiff's motion picture photoplay entitled "Movie Crazy" is without support in the evidence and is contrary to the evidence; and the court's finding that the characters, characterizations, motivation, treatment,

action, and sequence of action appearing in the fourth reel of the motion picture photoplay entitled "So's Your Uncle" were knowingly and wilfully copied, misappropriated, and plagiarized from a portion of plaintiff's motion picture photoplay entitled "Movie Crazy," is without support in the evidence and is contrary to the evidence.

9. The evidence shows that plaintiff did not suffer actual damage from the writing, production, distribution, release, or exhibition of the motion picture entitled "So's Your Uncle," and that defendant Bruckman did not participate in the production or distribution or release or exhibition of the motion picture photoplay entitled "So's Your Uncle."

10. The court's finding that plaintiff has been damaged in the sum of \$40,000.00 is without support in the evidence and is contrary to the evidence which shows that plaintiff suffered no damage whatever, and said finding is based entirely on speculation and conjecture.

11. The court's finding "that plaintiff's rights to re-issue and remake 'Movie Crazy' had been damaged is insufficient in law, because plaintiff has not, and never had, a monopoly of the right to remake 'Movie Crazy.'"

12. The damages awarded by the court against Defendant Bruckman are excessive.

13. The court's finding that a reasonable attorney's fee to be awarded the plaintiff is the sum of \$10,000.00 is without support in the evidence, and is contrary to law.

Brief of Argument.**A.**

PLAINTIFF'S COMEDY ROUTINE IS NOT WITHIN THE PROVISIONS OF SUBDIVISION (D) OF SECTION 1 OF THE COPYRIGHT ACT, BECAUSE IT IS COMMONPLACE, AND IF IT WERE WITHIN THE PROVISIONS OF SUBDIVISION (D) OF SECTION 1 THERE WOULD HAVE BEEN NO INFRINGEMENT, BECAUSE THE COMEDY ROUTINES WERE DISSIMILAR AND NO ONE COULD HAVE BEEN DECEIVED.

The finding that "Movie Crazy" is "an original motion picture photoplay * * * constituting copyrightable subject matter under the laws of the United States" [Tr. p. 33], as applied to the magician's coat routine is contrary to the evidence. The routine is made up of commonplace materials. It is not an integral part of the story in "Movie Crazy." It contains no theme at all, much less an original theme. If there is any originality, it consists of the order in which the commonplace materials are arranged. This is not sufficient to make it copyrightable. The finding that "the so-called magician's coat sequence * * * was copied and misappropriated by defendants" is likewise contrary to the evidence, as is the finding "the characters, characterization, motivation, treatment, action and sequence of action" in "So's Your Uncle" is the same as in "Movie Crazy." [Tr. pp. 34-35; *ante*, pp. 17-22; 9-14.] The evidence is that the magician's coat routine in "So's Your Uncle" was only suggested by and modeled after the routine in "Movie Crazy," and that the materials

borrowed are confined to gags, and stage business, and the order in which they appear. The backgrounds, settings, incidents, characters, dialogue, and the purposes to which the materials are put are all entirely different in "So's Your Uncle" than in "Movie Crazy." [*Ante*, pp. 12-16.]

The carefully considered case of *Harold Lloyd Corporation v. Witwer*, 9 Cir. (1933), 65 F. (2d) 1, is squarely in point. In that case this court reversed a judgment for plaintiff, although the similarities between the alleged infringing photoplay and the previously copyrighted story were far more striking than they are here, and the judgment rested on a finding similar to the finding here.

The finding there was that "substantial parts and portions of the Witwer story have been used, copied and appropriated by appellants including story structure, plot, gags, sequences of incident, event and situation * * *." (65 F. (2d) 19. For the finding here see *ante* p. 6.)

In the *Witwer* case, similarities to the story not only run through the whole photoplay, but are found in a comedy routine in the play that is similar to comedy situations in the very climax of the story. Here the similarities are in a single comedy routine which is not even an integral part of plaintiff's story. [*Ante*, pp. 8-11.]

In the *Witwer* case, in both the story and the play the hero was a college boy who aspired to popularity and athletic prowess. Each aspired to be called by a nickname. Each paraded in a sweater with a college letter. Each practiced football plays before a mirror. Each tried for the college team. Each failed. Each forced his way into the final game—the climax in both the story and the play—over the protest of the coach, and each

saved the day for the team by fantastic plays. Each courted a girl and did not win her until after the game.

But there were differences. Rodney in the story was an unattractive grind, and went out for athletics for their own sake. Harold in the story was a lovable fool who cultivated athletics as a means to popularity. Rodney was a weakling. Harold was a sturdy lad. Each met the girl under different circumstances. The attitude of the girl toward each was different. At the end of the football game Rodney emerged as a hero, and Harold as a "boob."

In reversing the case, this court held:

(1) "Unless the public is deceived by the pictures, and led to believe that the films are a picturization of plaintiff's literary work (the *standard of the ordinary observer* being applied) then no infringement is shown." (65 F. (2d) at p. 19.) (Italics are the Court's.)

(2) The only originality protected by copyright is originality in a theme.

(3) A subordinate sequence, not an integral part of the story as a whole, is not protected by copyright.

(4) Borrowing commonplace materials and using them differently does not constitute infringement, and "differences in the appearance, name, and character of Rodney and Harold and in the football scene" were sufficient to negative infringement. (65 F. (2d) at p. 28.)

Noting the similarities and differences mentioned above, and many others, Wilbur, Circuit Judge, who wrote the opinion for the court (McCormick, District Judge, dis-

senting), addresses himself to "what is copyrightable in plot, scene, or sequence of events in the story," saying:

"The dramatic and moving picture rights of a copyrighted story do not cover words (citing authority), voice, motions, or postures of actors (citing authorities), or a plot (citing authorities), but an original novel treatment of a theme (citing authorities)" (p. 22).

As to the effect of copying a part of a copyrighted work, Judge Wilbur says:

"The rule is well settled that matters in the public domain are not copyrightable, and we understand that the appellee concedes this and limits her contentions to what she considers the novel features of the story appropriated in the play. On this subject, Weil in his work on the 'Law of Copyright,' states the law as follows:

"Section 983. 'It should also be borne steadfastly in mind, that if a work is not entirely original, there is no copyright in the unoriginal part, which will prevent its use, separately, or in combination, with matter not covered by copyright. Hence, of course, any inquiry as to infringement must exclude *permissible reproduction* of such *non-original matter*.'" (Italics are the Court's.) (p. 24).

Judge Wilbur gives particular attention to the parts of the story and play relating to the football game.

As it is found in the story, Judge Wilbur says:

"The climax of the Rodney story is in the football game in which he earns fame with his school-

mates and becomes a football hero in the annals of the college. Moved by a desperate desire to redeem himself with the heroine Rodney argues for a right to go on the field in the last five minutes of the game when his college is losing, takes advantage of the silence and uncertainty of the coach and rushes on the field to take the place of a disabled player. In his excitement he forgets the signals, although he claimed to the coach to know them. The ball is thrown to him and without passing it, as the signals require, he runs down the length of the field and makes a touchdown, which not only wins the game but the plaudits of his classmates as well" (p. 3).

As to the similar sequence in the play, Judge Wilbur says:

"Harold Lamb also goes upon the field in the last five minutes of play when the score is against his team. He makes a touchdown, but instead of one successful play there are eight different plays, in each of which Harold demonstrates to the audience that he is a complete ignoramus and knows nothing about the game. On one play, although unopposed, he puts the ball down within two feet of the goal line on hearing a locomotive whistle, because the referee has told him on a previous play that when the whistle blows he must 'down the ball.' Harold Lamb believes in himself, takes his efforts with the utmost seriousness, has no doubt of his ability to participate in the game and win it, and actually does win it, but by a fluke, as was obvious to all concerned. Instead of becoming a football hero he is considered a boob and ridiculed as such" (p. 4).

In holding that the football sequence in the play does not infringe the football sequence in the story, Judge Wilbur says:

“The only thing in the play approximating a duplication of a scene in the story is that in which the hero argues with the coach in reference to participating in the final plays of the football game. In each case there is an argument, but the scene, considered independently from the story and the play merely as a scene or a subordinate sequence of events, is utterly commonplace and incapable of copyright monopoly. It is immaterial, therefore, whether or not there is copying” (p. 27).

In holding that borrowing commonplace materials and using them to a different purpose does not constitute infringement, Judge Wilbur quotes at length from the findings of the District Court and the argument of counsel as to the similarities between the play and the story (65 F. (2d) 19, 20, 22, 23). The quotations are too lengthy to set out here.

After quoting from the opinion of the District Court, Judge Wilbur comments:

“The plaintiff does not state what is new or novel about this plot or sequence of events found by the trial court, or about the matter claimed to have been copied or appropriated from the story. There is nothing abnormal about a college freshman desiring to succeed in athletics or desiring to be popular or to be called by a nickname. Rodney was abnormal, because, although an exceptionally fine scholar, he desired to be considered an ignoramus.” * * *

* * * * *

"Rodney was neither abnormal nor unusual in that, although having developed no athletic ability, he desires to become an athlete. Harold Lamb was abnormal only in that, in his desire to be popular and to do what he thought was the popular thing to do, he committed absurdities so enormous as to immediately attract the attention of his prospective schoolmates, so that in the very first contact with him they play a number of pranks on him and take advantage of his ignorance and desire to please" (p. 20).

Placing himself in the "attitude of a fairly indifferent and disinterested spectator of the moving picture play, 'The Freshman'," Judge Wilbur concludes:

"* * * IT WOULD OCCUR TO SUCH A SPECTATOR in the absence of suggestion to that effect, THAT HE WAS SEEING IN MOVING PICTURE FORM THE STORY OR ANY PART OF THE STORY OF THE 'EMANCIPATION OF RODNEY,' THIS BECAUSE OF DIFFERENCES IN THE APPEARANCE, NAME, AND CHARACTER OF RODNEY AND HAROLD AND IN THE FOOTBALL SCENE. IF THIS IS TRUE, THERE IS NO COPYING AND NO INFRINGEMENT. If we can see at first blush that there is no such similarity as would impress the ordinary observer, it is unnecessary to consider the question of novelty or copyrightability of such similarities as exist. We are of opinion that SUCH SIMILARITIES AS EXIST BETWEEN THE PLAY AND THE STORY, AND THERE ARE MANY, are such as require analysis and critical comparison in order to manifest themselves. THE OUTSTANDING FEATURE, THE CLIMAX OF BOTH STORY AND PLAY, IS THE FOOTBALL GAME, WITH NECESSARILY SOME SIMILARITY, BUT THERE IS NOTHING NEW AND NOVEL IN THAT OTHER THAN THE UNUSUAL PARTICIPATION OF THE HEROES IN THEIR RESPECTIVE GAMES, AND ON ANALYSIS THESE ARE NEITHER IDENTICAL NOR SIMI-

LAR IN SCENE NOR IN CONCEPTION OF THE TWO PRODUCTIONS.” (65 F. (2d) pp. 27-28.)

Harold Lloyd Corporation v. Witwer, *supra*, is supported by cases in other jurisdictions handed down both before and since that decision.

In *MacDonald v. Du Maurier*, 2 Cir. (1914), 144 F. (2d) 696, it is said:

“Ideas or basic plots are not protected by copyright. (Citing cases.) Neither are isolated incidents, (citing cases), nor even groups of incidents following necessarily or naturally from the plot or environment. (Citing cases.)” (p. 700).

In *Barnes v. Miner*, C. C., S. D., N. Y. (1903), 122 Fed. 480, 492, the court said:

“What is there that is novel in changing costumes or clothing?”

* * * * *

“* * * The order of events in plaintiff’s exhibition is of no materiality whatever” (pp. 491, 492).

In *Caruthers v. R. K. O. Radio Pictures*, D. C., S. D., N. Y. (1937), 20 Fed. Supp. 906, the court said:

“Even if the defendant had the episode of Isaiah and the cake suggested to it by the episode of Percy and the fan, it would not constitute any basis for a decree in the plaintiff’s favor, for the episode of Percy is merely glanced at as a supposedly *comic accretion to the story of the manuscript*, and is not *intrinsic to the development thereof*” (p. 907). (Italics ours.)

In *Glazer v. Hoffman*, Sup. Ct., Fla. (1943), 16 So. (2d) 53, it was held that an elaborate sleight-of-hand

performance developed by a magician, by which he produced drinks or beverages, such as highballs, cocktails, liqueurs, zombies, coffee and ice cream sodas from metal cocktail shakers, which were shown to be empty, and from beakers filled with water, as requested by members of his audience, was not protected by the provisions of the Copyright Act.

The following is from the opinion:

“In the case of *Serrana v. Jefferson*, C. C., 33 F. 347, the Court held that a mechanical contrivance consisting of a real tank, into which real water was made to flow and running thence off underneath the stage, representing a bridge above, *not being a link in the chain of incidents which, together with the speech and action of the performance, is not such a mechanical contrivance as entitled it to protection by copyright.*” (Italics ours.)

Barnes v. Miner, *supra* (122 Fed. 480), is instructive on its facts.

Plaintiff's performance consisted of the singing of well-known songs by a woman dressed to impersonate other singers, prefaced by a short dialogue, with a motion picture exhibition during the intervals when the performer was changing costumes. Plaintiff, Hattie Delaro Barnes, first appeared on the stage in opera cloak and evening dress, in front of a drop curtain behind the footlights, and gave a dialogue in which she said she would show quick changes of costumes in the dressing room by motion pictures. She left the stage and retired to her dressing room. While plaintiff was in her dressing room rapidly changing her costume from evening clothes to garments such as were worn by Anna Held, there was

thrown on the screen a series of moving pictures showing the plaintiff in the act of making the quick changes of costume in her dressing room. Plaintiff then appeared on the stage, dressed as Anna Held, and sang a song. After singing the song, she left the stage. Motion pictures were then thrown on the screen showing her changing her costumes from that of Anna Held to that of a boy. She then later appeared on the stage in the character of a boy.

The defendant's act showed the defendant, Adolph Zink, a man of small stature, in conventional evening clothes, who announced he would impersonate several well-known actors and actresses, and make quick changes from one character to another, first showing himself as Edna May, and then as May Irwin, and finally as Bath House John of Chicago. Zink did the various impersonations with singing. During the intervals, motion pictures showed him changing his costumes while he was in his dressing room.

The court held that plaintiff's act was not copyrightable, and defendant did not infringe it.

In reviewing cases holding that commonplace materials differently used do not constitute infringement, it is said in *Harvard Law Review*, vol. 44, at page 631:

"In *Curwood v. Affiliated Distributors*, [283 Fed. 223 (S. D. N. Y. 1922)], the plaintiff's murder mystery was found not to be infringed by the defendant's motion picture, which lacked the mystery element even though a series of incidents in the picture might have been a colorable imitation of a scene from the plaintiff's story. The tendency to deny recovery is well illustrated in the litigation over *The Spider*. [*Rush v. Oursler*, 39 F. (2d) 468 (S. D. N. Y.

1930).] Here a series of incidents climaxed by the highly dramatic murder of a supposed member of the audience was denied protection largely because the solution of the murder differed in the two plays. Where the underlying themes of the works are radically different, the solution is easier. Thus in *Frankel v. Irwin*, [34 F. (2d) 142 (S. D. N. Y. 1929)] despite the similarity of exciting moment, the defendant's play, with its ensuing character study, could hardly have been termed a colorable imitation of the plaintiff's elementary farce of incident."

The following is from the opinion in *Curwood v. Affiliated Distributors*, S. D. N. Y. (1922), 283 Fed. 223, the first case cited in the above excerpt from the Harvard Law Review:

"Without undertaking an analysis of 'Across the Pacific,' 'Chinatown Charlie,' and other 'thrillers,' the foregoing adequately shows that there can be no finding that the writer of the scenario complained of infringed upon Curwood when he had his hero ascend a flight of steps and enter the luxuriantly furnished living room of the Chinaman, and that on making his entrance the hero noticed a kneeling figure. The den in 'The River's End' and that in 'I Am the Law' are not of the same type. The latter is a dive of the worst imaginable character; the former is 'high-toned' " (p. 227).

In *Rush v. Oursler*, D. S. C. D. N. Y. (1930), 39 F. (2d) 468, the second case cited in the above excerpt from the Harvard Law Review, the court said:

"An ordinary observer of the three plays here involved would undoubtedly form the impression that

they were of the same type and had utilized the same material—that is, a shooting in a theater and the solution of the crime. * * * The differences in the plays are more striking than their similarities, which relate only to the actual occurrence of the murder, and not to the solution of the mystery.

“The inquiry always is: What, if anything, has been appropriated; and then, whether the appropriation was of copyrighted material and was substantial. *Dymow v. Bolton* (C. C. A.), 11 F. (2d) 690. The interruption of a stage performance by a murder in a crowded theater of a person seated in the audience is a dramatic incident which *per se* is not copyrightable, and no one could by obtaining a copyright withdraw from others the right to portray such an occurrence in literary or dramatic form” (pp. 472-473).

In *Frankel v. Irwin*, D. C. S. D. N. Y. (1918), 34 F. (2d) 142, the case last cited in the above excerpt from the Harvard Law Review, the court referred to “farces, which, unless at least suggestive of genuine human thoughts, desires, and intents, are mere slapstick clowning,” (p. 144) and said:

“Thus I think the first inquiry is as to words used, and the structure of sentences; here there is no similarity at all. Next as to the spirit or purpose of the two plays; plaintiff’s is an elementary farce of incident, *e. g.*, the acceptance of the daughter’s lover is infinitely less important than the unexpected mechanical piano player that starts when the father bumps against a knob in a darkened room. Defendant’s novel, however, has a definite theme, *viz.*, the cure of false pride in a really kind and upright

woman, when, as the result of stooping to deceive, she discovers some, at least, of the human values, and many of the petty difficulties of life, previously ignored as beneath her station. This scheme is worked out in thoroughly conventional manner in Scott's novel, through entanglements with the lover of the servant whose identity is assumed, a theme at least as old as the Italians Chaucer borrowed from, and accusations of wrong based on mistaken identity, a plan Shakespeare shamelessly took from Plautus" (p. 145).

B.

PLAINTIFF'S COMEDY ROUTINE IS NOT WITHIN THE PROVISIONS OF SUBDIVISION (D) OF SECTION 1, BECAUSE, WHILE IT IS ENTERTAINMENT, IT IS NOT DRAMATIC COMPOSITION.

The magician's coat routine in "Movie Crazy" is not drama. It tells no connected story. It does not portray life. It is made up entirely of commonplace incidents, and changing of clothes, clowning, dancing, sleight-of-hand, stage business, and circus tricks.

"Farces," says Hough, Circuit Judge, in *Frankel v. Irwin, supra*, "which, unless at least suggestive of genuine human thoughts, desires, and intents, are mere slapstick clowning." (34 F. (2d) at 144.)

In *Corcoran v. Montgomery Ward & Co.*, 9 Cir. (1941), 121 F. (2d) 572 [certiorari denied 314 U. S. 687], this court held that "doggerel verse entitled 'Plain Bull,' consisting of thirteen four-line stanzas descriptive of a cowboy's attempt to put his brand on a maverick bull, which, incidentally, proved to be by no means a

counterpart of the gentle Ferdinand” was not dramatic composition.

Healy, Circuit Judge, speaking for the court, said:

“* * * in any event the poem is not properly classifiable as a dramatic work. * * * While the poem has action in plenty, it lacks in the form in which it was written certain of the qualities of a dramatic work, notably dialogue and a perceptible plot.” (121 F. (2d) p. 574.)

In *Seltzer v. Sunbrook*, D. C. S. D., Calif. (1938), 22 Fed. Supp. 621, the late Judge Jenney, in holding that a roller skating derby was not within the provisions of Subdivision (d) of Section 1, discussed the difference between entertainment that is, and entertainment that is not, dramatic composition.

Referring to the Copyright Act as a whole, Judge Jenney said:

“* * * Even a cursory reading of the act reveals the fact that certain provisions thereof pertain to all copyrighted matter, while others relate specifically to music, or to the drama or to some other special category. The precise scope of each class therefore becomes important in ascertaining the extent to which special provisions apparently applicable to one class may be governing as to other copyrighted matter. The statute itself is silent on this point. There are no clauses creating definite boundaries for each classification. Accordingly, that problem has fallen to the courts, which have been compelled to limit the subject-matter to be included in each class—in the light of the traditional purposes of copyright law and with due regard to the additional safeguards against piracy which the various amend-

ments to the act have provided.” (22 Fed. Supp. p. 627.)

Turning to “dramatic compositions,” Judge Jenny said:

“The courts, in determining what constitutes a dramatic composition, have emphatically stated that there must be a story—a *thread of consecutively related events*—either narrated or presented by dialogue or action or both. (Citing authority.) Attempts have been made to extend the protection afforded dramas under the act to other forms of composition spectacular in nature and theatrical in presentation, but lacking the story element. Even in the early days of interpretation of the Copyright Act, however, the distinction between a mere exhibition, spectacle, or arrangement of scenic effects on the one hand, and a true dramatic composition on the other, was well recognized.” (22 Fed. Supp. pp. 628-629.) (*Italics ours.*)

Judge Jenney then reviewed the case of *Martinetti v. Maguire*, 16 Fed. Cas. p. 920, decided in 1867, in which it was held that a spectacle showing “the exhibition of women in novel dress or no dress, and in attractive attitudes or action,” with dialogue that is “very scant and meaningless,” was not drama. (22 Fed. Supp. p. 629.)

Judge Jenney continued:

“Since the time of that decision, repeated efforts have been made to secure an enlargement of the scope of copyright law so as to provide protection for various new forms of originality. Congress, in subsequent amendments to the act, has made provision, in additional classifications, for certain new types of composition, notably motion pictures. But

none of these revisions, including the very significant one of 1909, have added anything to the act to change the original definition of a 'drama' as enunciated by the courts. New media in which dramas could be presented were recognized. New provisions have sweepingly prohibited unauthorized dramatizations of any kind by any means whatsoever. (Citing Section 1(d).) But there has been no statutory abandonment of any of the fundamentals previously held indispensable to a genuine dramatic composition.

"The courts likewise have clung to first principles and have refused to extend the definition of a 'drama' to include other forms of composition having no *bona fide* plot or story." (22 Fed. Supp. p. 629.)

Copyright protection was first extended to dramatic compositions by Congress in 1856.

Thorvald Solberg, *Copyright Enactments of the United States*, (1783-1906), p. 43.

Inasmuch, as Judge Jenney points out, none of the revisions "have added anything to the act to change the original definition of a 'drama' as enunciated by the courts," it is significant that before 1856 the difference between drama and grotesque hobbledohoy such as the magician's coat routine was clearly understood.

In *Professor Jacko v. The State* (1853), 22 Ala. 73, it was held that a license to keep a theatre did not protect the plaintiff in error from criminal prosecution for exhibiting feats of sleight-of-hand and legerdemain, and clownish dialogues and scenes.

Said the court:

“* * * The term ‘drama’ as defined by Mr. Webster, means a poem or composition representing a picture of human life, and accommodated to action. It may be conceded, that its signification is broad enough to cover any representation in which a story is told, a moral conveyed, or the passions portrayed, whether by words and actions combined, or by mere actions alone; yet it would by no means follow, that the terms ‘theatre’ and ‘circus’ were synonymous or convertible terms. * * * They may both be arranged under the general term ‘amusements,’ but differ from each other as one species differs from another under the same genus.”

In *Thurber & Atkin, Overseers of the Poor of Delhi v. Sharp* (N. Y. 1852), 13 Barbour 627, the court had the following statute before it:

“No person shall exhibit or perform for gain or profit, any puppet-show, any wire or rope dance, or any other idle shows, acts, or feats, which common showmen, mountebanks, or jugglers usually practice or perform”; (pp. 627-628).

The court upheld a conviction under this statute of white persons who appeared in public for gain, dressed and disguised as negroes, and imitated their language and actions, sang negro songs, performed dances in grotesque manner, and did pretended feats as psychologists and mesmerizers.

A similar conviction under the same statute had been upheld against circus performers in 1834 in *Downing & Potter, Overseers of the Poor of Ithaca v. Blanchard* (N. Y.), 12 Wendell's Reports. (2nd Ed.) (1834); p. 383.

Section 201.4 of *Code of Federal Regulations of the Copyright Office* provides:

“The designation ‘dramatic composition’ does not include the following: Dances, motion-picture shows; stage settings or mechanical devices by which dramatic effects are produced, or ‘stage business’; animal shows, sleight-of-hand performances, acrobatic or circus tricks of any kind; scenarios for, or descriptions of motion pictures or of settings for the production of motion pictures.”

While the provision of the Code of the Copyright Office above quoted was promulgated for the convenience of the Copyright Office in administering Section 5 of the Copyright Act, the rule is based on and correctly summarizes the case law on the subject.

In *Fuller v. Bemis*, C. C. S. D. N. Y. (1892), 50 Fed. 926, the court held that three elaborate tableaux, the performance of which required a considerable portion of, if not an entire, evening, did not constitute a dramatic composition, and were not protectable by copyright.

In that behalf, the court said:

“An examination of the description of complainant’s dance, as filed for copyright, shows that the end sought for and accomplished was solely the devising of a series of graceful movements, combined with an attractive arrangement of drapery, lights, and shadows, telling no story, portraying no character, depicting no emotion. The merely mechanical movements by which effects are produced on the stage are not subjects of copyright where they convey no ideas whose arrangement makes up a dramatic composition. Surely, those described and practiced

here convey, and were devised to convey, to the spectator, no other idea than that a comely woman is illustrating the poetry of motion in a singularly graceful fashion. Such an idea may be pleasing, but it can hardly be called dramatic" (p. 929).

In *American Mutoscope & Biograph Co. v. Edison Mfg. Co.*, C.C.N.J. (1905), 137 Fed. 262, after holding on the authority of *Edison v. Lubin*, 3 Cir. 122 Fed. 240, that a motion picture was copyrightable as a photograph (the classification given by the Copyright Office, before the amendment of 1912 to Section 5),¹ the court denied a preliminary injunction on the ground that it did not appear that defendant's motion picture had been copied from defendant's film, and there was a question as to whether it was not a similar picture made independently.

The following is from the opinion:

"We are brought, therefore, to the consideration of the question as to whether a preliminary injunction should be allowed. The affidavits show that the defendant also has had its series of pictures duly copyrighted, and that they were taken by placing its camera at two or three points near Gen. Grant's Tomb and at other places in a country district in New Jersey. The defendant's pictures were taken at times different from those of the complainant, and by securing a different set of actors, dressed in different costumes. In the first scene of each photograph Gen. Grant's Tomb is visible, and before it appears a man, who is soon met by several women, who crowd about him, and from whom he attempts to run away. In each of the photographs are successive

¹See Appendix, p. 13.

scenes showing the man and the women running down the roadway leading from the tomb, and across fields and through hedges, and jumping over fences and down banks. The two photographs possess many similar and many dissimilar features. The defendant denies having copied any part of the complainant's photograph. Its photographer says:

'The negative prepared by me did not and does not contain a single copy of any of the pictures of complainant's films. Each impression is a photograph of a pantomime arranged by me, and enacted for me at the expense of the owner of the film which I produced. My photograph is not a copy, but an original. It carries out my own idea or conception of how the characters, especially the French nobleman, should appear as to costume, expression, figure, bearing, posing, gestures, postures, and action.' * * *

* * * * *

"I am not prepared to say on the evidence now before me, that the defendant has appropriated the substance of any part of the complainant's copyright. The copying of the complainant's photograph is asserted on the one side and denied on the other. There has been no cross-examination of witnesses. * * *

"The conclusion is that the preliminary injunction must be denied." (pp. 267-268.)

The case is cited with approval in *Harper Bros. v. Kalem Co.*, 2 Cir. (1909), 169 Fed. 61, 63.

In *Chappell & Co. v. Fields*, 2 Cir. (1914), 210 Fed. 864, the court said:

"* * * the voice, motions, and postures of actors and mere stage business may be imitated because they have no literary quality and cannot be copyrighted." (p. 865.)

In *Bloom & Hamlin v. Nixon*, C. C. E. D. Pa. (1903), 125 Fed. 977, the court declined to enjoin the imitation of stage business appearing in the celebrated "The Wizard of Oz," consisting of "the rather striking impertinence" of making one of the audience uncomfortable by singling him out and singing to him.

In *Tate v. Thomas*, (1921), 1 Chancery Division 503, the court said:

"* * * His assistance, such as it was, was confined to accessorial matters such as scenic effects, or stage 'business' not the subject matter of copyright." (p. 510.)

In *Tate v. Fullbrook*, (1908), 1 King's Bench Div., 821 (Court of Appeal), the court also held "stage business" was not the subject matter of copyright. The following is from the Report:

"* * * There was also a considerable degree of family likeness as regards the comic 'business' in the two pieces—for instance, in both pieces one of the effects consisted in a cracker being placed by the street urchin under and exploded by the foot of one of the characters. It was also alleged that expressions were introduced into the defendant's piece by way of 'gag' which had been taken from similar 'gag' in the plaintiff's piece as performed." (p. 822.)

Glazer v. Hoffman, *supra* (16 So. 2d) and *Professor Jacko v. The State*, *supra* (22 Ala 73), both hold that sleight-of-hand and conjuring do not constitute drama.

Barnes v. Miner, *supra* (122 Fed. 480), holds that a vaudeville act, in which the changing of clothes is shown by motion picture during an intermission was not drama.

C.

PLAINTIFF'S PHOToplay AS A WHOLE IS NOT WITHIN THE PROVISIONS OF SUBDIVISION (d) OF SECTION 1, BECAUSE IT IS COMMONPLACE AND IS NOT DRAMATIC COMPOSITION, BUT IS MERE SLAPSTICK CLOWNING.

"Movie Crazy" has no theme at all, much less an original theme. It does not portray life. It consists of gags and stage business strung on a thread of disconnected incidents, all of which are commonplace. Insofar as there is a story, it does not contain "a thread of consecutively related events," and is commonplace. The characters also are all commonplace, and too faintly delineated to be characters in real life. Harold is a slapstick comedian. Mary is a "movie queen" of bygone days. Vance is an old-time "heavy." O'Brien is a typical harassed executive. Kitterman is the conventional hard-boiled magnate, with a sense of humor. If there is any originality at all, it is in the order of the incidents, and in the gestures, postures, and facial expressions of Harold Lloyd, and that is not enough. (*Ante* pp. 23-26.)

It is submitted that the authorities reviewed under propositions A and B establish proposition C.

Special attention need only be called to the following:

"Farces, which, unless at least suggestive of genuine human thought, desires, and intents, are mere slapstick clowning."

Frankel v. Irwin, supra, (34 F. 2d at 144).

"The dramatic and moving picture rights of a copyrighted story do not cover words (citing cases), voices, motions, or postures of actors (citing cases),

or a plot (citing cases), but an original novel treatment of a theme."

Harold Lloyd Corporation v. Witwer, supra, (65 F. 2d at p. 22).

"*'The plot is common property; no one by presenting it with modern incidents can appropriate it by copyrighting.'*" (*Id.*, p. 24.) (Italics are the court's.)

"*'Nor does she fare better as to her character. It is indeed scarcely credible that she should not have been aware of those stock figures, the low comedy Jew and Irishman. * * * Even though we take it that she devised her figures out of her brain de novo, still the defendant was within its rights. * * * the lovers are so faintly indicated as to be no more than stage properties.'*" (*Id.*, p. 26.)

"Obviously the Constitution does not authorize such a monopoly grant to one whose product lacks all creative originality. And we must, if possible, so construe the statute as to avoid holding it unconstitutional. Plaintiff therefore must lose unless he has shown that his work contains some substantial, not merely trivial, originality and that the defendant sold copies embodying the original aspects of his work." (Frank, Circuit Judge, in *Chamberlin v. Uris Sales Corporation*, 2 Cir. (1945), 150 F. (2d) 512, 513.)

In *Corcoran v. Montgomery Ward & Co., supra*, our Circuit Court of Appeals said:

"* * * Many prose compositions have been set to music.

"Whatever may superficially appear to be the justice of appellant's claim, it is to be remembered that his

case is governed entirely by the statute. And while in the 1909 revision of the Copyright Act composers were given the exclusive right of recording their copyrighted musical compositions and the like right was granted to authors of copyrighted dramatic works, Congress did not see fit to give like protection to copyrighted poems, stories or works of that nature.” (121 F. (2d) at p. 574.)

From what has been said, it is clear that “Movie Crazy” does not come within the protection of subdivision (d) of Section 1. Plaintiff does not, therefore, have the monopoly of “the stage rights” or “the play rights” given by subdivision (d) of Section 1. “Movie Crazy” may, perhaps, be regarded as a photograph, or series of photographs, and plaintiff may have a monopoly, under subdivision (a) of Section 1 of the “copy rights,” *i. e.*, the right to multiple copies by making physical impressions and selling them. (See, *Bleistein v. Donaldson Lithographing Co.*, 188 U. S. 239, 248-250, 47 L. Ed. 460 (1903); *American Mutoscope & Biograph Co. v. Edison Mfg. Co.*, C. C. N. J. (1905), 137 Fed. 262; *Patterson v. Century Productions*, D. C. S. D. N. Y. (1937), 19 Fed. Supp. 30; *aff’d* 2 Cir. (1937) 93 F. (2d) 489; *Cert. den.* 303 U. S. 655, 82 L. Ed. 1114.) If not, plaintiff, like Corcoran or the designer of ladies’ hats, or businessmen generally, must be satisfied with the money it has already made, or the money it will still make, by reason of the superiority of its product and its own enterprise.

D.

APPELLANT BRUCKMAN IS NOT LIABLE AS AN INFRINGER, BECAUSE HE HAD NOTHING TO DO WITH THE PRODUCTION, RELEASE, OR EXHIBITION OF THE ALLEGED INFRINGING PHOTOPLAY.

Section 25 of the Copyright Act provides:

“That if any person shall infringe the copyright in any work protected under the copyright laws of the United States such person shall be liable:

“(a) To an injunction restraining such infringement;

“(b) To pay to the copyright proprietor such damages as the copyright proprietor may have suffered due to the infringement, as well as all the profits which the infringer shall have made from such infringement.” (Italics ours.)

The complaint charges that “defendants and each of them infringed upon plaintiff’s said copyright by producing and commencing distribution, release and exhibition to the general public * * * of a motion picture photoplay entitled ‘So’s Your Uncle’.” [Tr. p. 4; *ante*, p. 4.] Plaintiff did not undertake to prove the allegations as to Bruckman. The evidence was that Bruckman was merely a writer in the employ of defendant Universal, and had nothing to do with the production, distribution, release, or exhibition of “So’s Your Uncle” (*ante*, p. pp. 6, 27.) The court found that defendant Universal alone “produced, distributed, released and exhibited * * * said motion picture photoplay entitled ‘So’s Your Uncle’ in violation of plaintiff’s exclusive rights in and to its copyright upon said motion picture ‘Movie Crazy’.” [Tr. p. 35; *ante*, pp. 30-31.]

Bruckman did not violate subdivision (d) of Section 1 of the Copyright Act, because he did not perform or represent plaintiff's copyrighted work publicly. Hence, his acts were not within Section 35 because he did not "infringe," and plaintiff has not "suffered" any damages "due to the infringement."

The words "damages" and "profits" are used with the same limitations in section 25.

In *Washingtonian Pub. Co. v. Pearson*, C. A. D. C. (1944), 140 F. (2d) 465, 467, the court said:

"The Copyright Act makes an infringer liable for the profits which 'the infringer' derives from the infringement. It does not make him liable for the profits which other infringers derive from the same infringement. The purpose of permitting recovery of profits is to prevent unjust enrichment. Both the language and the purpose of the Act indicate that the court was right in not requiring authors who made a nominal profit, and a printer who took a loss, to account for the profits which the publisher made."

In *Russell v. Briant*, 8 C. B. 836, 848, 137 Reprint 737, Wilde, C. J., said:

"No one can be considered as an offender against the provisions of * * * [the act] so as to subject himself to an action of this nature, unless, by himself, or his agent, he actually takes part in a representation which is a violation of copyright."

It is said in 18 C. J. S.:

"* * * persons in no way connected with, responsible for, or benefiting by, the infringement are not liable therefor merely because standing in some relation to the infringer." (§ 120, p. 238.)

E.

THERE WAS NO DIRECT EVIDENCE OF DAMAGE, AND NO RELEVANT DATA FROM WHICH DAMAGE COULD BE INFERRED, AND THE DAMAGES AWARDED WERE ENTIRELY CONJECTURAL AND INTERMINGLED WITH DAMAGES THAT ARE NOT RECOVERABLE.

To repeat the finding of the court as to damages:

“The Court further finds that *plaintiff's rights to reissue and remake* said motion picture photoplay entitled ‘Movie Crazy’ were *substantially damaged* and impaired by reason of said infringing acts of defendants but that the extent to which said rights were impaired and damaged did not and does not exceed the sum of \$40,000.00.” [Tr. p. 36.] (Italics ours.)

The finding must fall because it is not based on evidence.

The only evidence as to damages was opinion evidence. Plaintiff's witnesses expressed the opinion that the damages were \$300,000.00. Defendants' witnesses expressed the opinion that there was no damage whatever. (*Ante*, pp. 30-32.) There is an implied finding that all of the opinion evidence was untrue. The figure of \$40,000.00 was nothing but a guess.

The finding must fall also because subdivision (d) of Section 1, whether read literally or read with the background and legislative history of the Act of 1909 and the 1912 amendments (see Appendix; *infra* pp. 3-4), and with subdivision (b) of Section 1, and Section 11 does not give plaintiff a monopoly of “remake rights” of “Movie Crazy.”

Lloyd was at pains to explain that the remaking of an old picture means making an entirely new one, and only using the old one as a guide. [Tr. pp. 368, 369.]

In *White-Smith Music Pub. Co. v. Apollo Co.* (1908) 209 U. S. 1, 17, it was held that the reproduction of sheet music by music roll was not an infringement of the copyright of the music, saying:

“The statute has not provided for the protection of the intellectual conception apart from the thing produced, however meritorious such conception may be, but has provided for the making and filing of a tangible thing, against the publication and duplication of which it is the purpose of the statute to protect the composer.”

In *Corcoran v. Montgomery Ward & Co.*, *supra*, this court said:

“Appellant relies also on the provisions of subsection (b), giving the exclusive right ‘to translate the copyrighted work into other languages or dialects, or make any other version thereof, if it be a literary work; to dramatize it if it be a nondramatic work * * *.’ It is claimed that the recording with music constitutes the making of another ‘version’ of the poem, and also amounts to a dramatization of it.

“The precise meaning of the phrase ‘any other version’ appears not to be settled by the decisions. The phrase has been held to apply to abridgements. (Citing authorities.) It has been suggested that it refers to versions of a literary nature. Ladas, *The International Protection of Literary and Artistic Property* (1938) p. 779. However that may be, we think what was done here does not constitute the making of another version of the poem within the

meaning of the statute. In the committee report referred to in the above note it was said that subsection (b) is 'consistent with the existing law as construed by the courts.' Something new would be imported into the law if appellant's position were to have judicial approval. *White-Smith Music Publishing Co. v. Apollo*, *supra*. And, if the phrase were to be construed so broadly as appellant claims it should be, the many provisions of the act dealing with particular versions would be rendered superfluous, as, for example, the provision in subsection (d) giving the proprietor of a dramatic work a monopoly of the right 'to make or procure the making of any transcription or record thereof.'" (121 F. (2d) 573.)

In *Arnstein v. Edward B. Marks Music Corporation*, 2 Cir. (1936), 82 F. (2d) 275, the court said:

"* * * Section 4952 of the Revised Statutes, it is true, gave to 'the author of a work the sole liberty of printing, reprinting, publishing * * * and vending the same,' and the act of 1909 has not changed the law [section 1 (a), title 17, U. S. Code, 17 U. S. C. A. sec. 1 (a)], though it did somewhat enlarge the definition. Our reasoning in *Hein v. Harris*, *supra*, cannot therefore be confined to musical copyrights, for the same language covers all copyrighted productions; it can be defended only in case copyrights, like patents, are monopolies of the contents of the work, as well as of the right to manifold the work itself. That is contrary to the very foundation of copyright law, and was plainly an inadvertence which we now take this occasion to correct. *Baker v. Selden*, 101 U. S. 99, 25 L. Ed. 841. Verbally our error arose from not reading the words, 'the same,'

in Rev. St. Sec. 4952, as referring back to the words, 'the work.' The 'sole liberty of printing, publishing and vending' the 'work' means the liberty to make use of the corporeal object by means of which the author has expressed himself; it does not mean 'the sole liberty' to create other 'works,' even though they are identical. Were it not so the man who first made and copyrighted a photograph under section 5(j) of title 17, U. S. Code, 17 U. S. C. A. sec. 5(j), could prevent every one else from publishing photographs of the same object."

The case just quoted from was approved in *Oxford Book Co. v. College Entrance Book Co.*, 2 Cir. (1938), 98 F. (2d) 688, 691, where it was said:

"The true concept of what a copyright covers as well as what it does not was given by Judge Learned Hand in *Arnstein v. Edward B. Marks Music Corp.*, supra, when he said, '*The "sole liberty of printing, publishing and vending" the "work" means the liberty to make use of the corporeal object by means of which the author has expressed himself; it does not mean "the sole liberty" to create other "works," even though they are identical*.' " (Italics ours.)

The finding must fall also because of the absence of evidence that plaintiff had offered "Movie Crazy" for sale or had offers of purchase.

In *D'Ole v. Kansas City Star*, C. C. W. D. Mo. (1899), 94 Fed. 840, 841, the court said:

"* * * Furthermore, how could the court, with any degree of required certainty, justifying the assessment of damages against the defendant, determine what damage resulted to the plaintiff from such pub-

lication in this newspaper? The plaintiff did not distribute or attempt to distribute, or sell, a single copy of this pamphlet after the publication in the newspaper, to enable the court by comparison to determine in the remotest degree how the commercial value of his pamphlet was affected by such publication. He could not, without such test or effort, content himself by simply saying that he assumed that his exclusive property in the pamphlet was injured by the newspaper publication, and that it would be useless for him to make the effort to dispose of his pamphlet. Such a method of constituting a basis for the assessment of damages would be too easy for the plaintiff, and would certainly be a very unsafe criterion for the court to recognize in assessing such damages."

The finding must fall also because there is no evidence that any one remembered the magician's coat routine in "Movie Crazy" or would remember the routine in "So's Your Uncle."

In *Fred Fisher v. Dillingham*, D. C. S. D. N. Y. (1924), 298 Fed. 145, 152, the court said:

"The plaintiff may, of course, take the usual injunction, though under the circumstances it will apparently be of no service. As for damages, it seems to me absurd to suggest that it has suffered any injury. 'Dardanella' had faded out before 'Kalua' appeared; but, if it had been at the peak of its popularity, I do not believe that the accompaniment to the chorus of 'Kalua' would have subtracted one copy or one record from its sales. The controversy is 'a trivial pothole' (Hough J., dissentiente in *Jewelers, etc. Co. v. Keystone Pub. Co.* (C. C. A.), 281 Fed. 83, 95), a mere point of honor, of scarcely more than irritation, involving no substantial interest. Ex-

cept that it raises an interesting point of law, it would be a waste of time for every one concerned.

“However, section 25 (Comp. St. Sec. 9546) fixes a minimum of \$250, which is absolute in all cases. Since *Westerman Co. v. Dispatch Co.*, 249 U. S. 100, 39 Sup. Ct. 194, 63 L. Ed. 499, any doubts reserved in *Hendricks Co. v. Thomas Pub. Co.*, 242 Fed. 37, 154 C. C. A. 629 (C. C. A. 2) are laid. Therefore I must and do award that sum as damages. The plaintiff is likewise absolutely entitled to a full bill of costs, but I will make no allowance for counsel fees, since that is discretionary. Such victories I may properly enough make a luxury to the winner.”

The finding must fall also because it cannot be ascertained from the record whether the damage, if any, resulted from Universal's photoplay “So's Your Uncle” or from Columbia's picture “Loco Boy Makes Good.”

In *Wappenstein v. Schrepel*, (Wash. 1943), 142 Pac. (2d) 897, 899, the court said:

“Where pecuniary damages are sought, there must be evidence not only of their actuality but also of their extent, and there must be some data from which the trier of the fact can with reasonable certainty determine the amount. Where there is evidence as to injuries or loss resulting from various causes, for some of which the defendant cannot be held responsible, but no evidence of the portion of such injuries or loss for which the defendant may be liable, the proof is too uncertain to enable the jury to determine the amount of such injury or loss. (Citing cases.)”

This rule is applied in *Kershaw Mining Co. v. Lankford*, (Ala. 1925), 105 So. 896, an action to recover

damages to a mine; in *Lusk v. Onstott*, (Texas, 1944), 178 S. W. (2d) 549, an action for damages caused to lands by overflow water; and in *Parker v. Pettit*, (Oregon, 1943), 138 Pac. (2d) 592, 596, a malpractice case.

Conclusion.

"'Movie Crazy'" (to borrow the language of McCormick, District Judge, used in 65 F. (2d) 1, 35, with reference to "The Freshman, an earlier Lloyd picture") "is designed as a vehicle to convey to an audience the comical youthful pranks and antics that characterize all the cinema productions of Harold Lloyd."

Harold Lloyd's "slapstick clowning" (*Frankel v. Irwin*, 34 F. (2d) 142, 144) in the magician's coat comedy routine, or for that matter in "Movie Crazy" as a whole, is burlesque, and nothing but burlesque.

Note the definition of burlesque found in *The Columbia Encyclopedia* (1935):

"burlesque (-lesk') [Ital.,—mockery], a form of entertainment differing from comedy or farce in that it secures its effects from exaggeration, ridicule, mockery, and distortion."

Referring to the year 1909 when motion pictures generally resembled Lloyd's "slapstick clowning"¹ it is said in

¹In *The Film till now. A Survey of the Cinema*, by Paul Rotha, it is said, referring to the period after the advent of Lubitsch as a director: "It was the era of a new type of comedy, not the *slapstick of Lloyd* or the ludicrous style of Keaton, but a suave, polished, slick, slightly-satirical, sexual comedy." (p. 77.) (Italics ours.) It is also said, referring to the work of Chaplin beginning in 1913: "These comedies are usually known as the Keystone period, that being the name of the producing firm. Their character was pure slapstick with the customary ingredients—throwing of custard pies, falling down, hitting people on the head and being hit back." (p. 103).

Metro-Goldwyn-Mayer v. Bijou Theatre Co., D. C. Mass. (1931), 50 F. (2d) 908, 909-910:

“Nobody then thought of ‘drama’ or ‘dramatic work’ in terms of motion pictures.”

But, even though the magician’s coat comedy routine and “Movie Crazy” as a whole had the protection of dramatic copyright, there is no justification for the finding that the “magician’s coat sequence” was copied, or the finding “that the characters, characterization, motivation, treatment, action and sequence of action” of the two comedy routines are the same, when all that was done was to borrow commonplace gags and stage business, with different locale, different actors, different characters, different dialogues, and different costumes, and use the gags and stage business to an entirely different purpose. Particularly it is true, in the face of uncontested evidence that “all comedians do the same gags.” [Tr. p. 338.]

How could one who saw the comedy routine in “So’s Your Uncle” possibly have deceived himself into believing he was attending “Movie Crazy”?

What of the finding that Bruckman, who had done no more than write the script for the comedy routine in “So’s Your Uncle,” without any voice whatever in the decision to include the same in the picture, had damaged plaintiff in the selfsame amount as had Universal which produced and distributed and exhibited the same in over 6000 theaters?

And what are we to think of the allegation in plaintiff’s verified complaint that “So’s Your Uncle” “is largely copied from and based upon plaintiff’s said copyrighted motion picture photoplay entitled ‘Movie Crazy’ ”? [p. 4].

And the allegation that Bruckman produced, distributed, and exhibited "So's Your Uncle"?

What of the finding of \$40,000.00 damages, without any evidence to support it?

Was not plaintiff's claim for damages, as well as the court's finding, based on guesswork, and nothing but guesswork?

Consider that "Movie Crazy" had netted \$400,000.00 thirteen years before, when Lloyd was one of the two or three great personalities in pictures, but had not been shown for ten years and had never been the subject matter of an offer of purchase. And consider the testimony of Lloyd himself that property values in "Movie Crazy" had been damaged \$300,000.00 by a Class B picture made with unknown players (except one player cast in a minor role) which was a flop.

Consider, also, Lloyd's testimony on cross-examination:

"Q. [By Mr. Lewinson] You don't know how many theatres the Columbia picture was shown in, do you? A. All I know is I haven't the slightest idea where any of them ever played in this city. I have never seen one.

Q. When you testified that the re-issue rights of your picture prior to the making of So's Your Uncle were \$100,000 and the value of the re-make rights were \$200,000, did you take into account the damage that had already been done by the Columbia picture? A. I think, because of the—

Q. Did you take that into account? A. Now, wait a minute. Let me understand just what you are trying to do. I saw that picture only—

The Court: That is not the question. He wants to know whether when you fixed the amount of damages that you claim in this case you took into consideration the fact that your sequence had been used in another picture as well as the one that you are claiming against? A. I would say yes, I had. *I would say that the statement that I made before would stand, anyway.* [Tr. pp. 156-157.]

What of the liability of Bruckman for invading plaintiff's monopoly of "performing" rights when there is no finding that he had had anything whatever to do with the production, distribution, or exhibition of "So's Your Uncle"?

If we give credit to plaintiff's counsel for the finding "that the characters, characterization, motivation, treatment, action and sequence of action," in the two comedy routines are the same, it may well be said that the many errors of the court below were due to misconceptions of law.

At the opening of the trial the court indicated that it was of the opinion that any borrowing of material whatever from plaintiff's photoplay constituted infringement, even though the material borrowed was not dramatic in character and was not a part of the story of plaintiff's film as a whole. This misconception of the court was a fixed idea

which could not be influenced by argument [Tr. pp. 63, 65, 68, 87, 140, 237-8]. In addition to this misconception, the court also expressed the opinion that where infringement is shown, actual damages result as a matter of course, and the amount of damages is largely guesswork [Tr. pp. 244, 379].

It is plain that plaintiff did not produce evidence showing either liability or damage, particularly as to Bruckman; also, that the finding as to attorney's fees, being ancillary, must fall with the finding as to damages.

It is submitted that the judgment as to Bruckman should be reversed in its entirety with directions to enter a judgment of dismissal.

Respectfully submitted,

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APPENDIX.

I.

Excerpts From Copyright Act of 1909 as Amended in 1912 (1912 Amendments Are in Italics).

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, [Section 1] That any person entitled thereto, upon complying with the provisions of this Act, shall have the exclusive right:

"(a) To print, reprint, publish, copy, and vend the copyrighted work;

"(b) To translate the copyrighted work into other languages or dialects, or make any other version thereof, it if be a literary work; to dramatize it if it be a non-dramatic work; to convert it into a novel or other non-dramatic work if it be a drama; to arrange or adapt it if it be a musical work; to complete, execute, and finish it if it be a model or design for a work of art;

* * * * *

"(d) To perform or represent the copyrighted work publicly if it be a drama or, if it be a dramatic work and not reproduced in copies for sale, to vend any manuscript or any record whatsoever thereof; to make or to procure the making of any transcription or record thereof by or from which, in whole or in part, it may in any manner or by any method be exhibited, performed, represented, produced, or reproduced; and to exhibit, perform, represent, produce, or reproduce it in any manner or by any method whatsoever;"

"Sec. 4. That the works for which copyright may be secured under this Act shall include all the writings of an author."

“Sec. 5. That the application for registration shall specify to which of the following classes the work in which copyright is claimed belongs:

“(a) Books, including composite and cyclopaedic works, directories, gazetteers, and other compilations;

“(b) Periodicals, including newspapers;

“(c) Lectures, sermons, addresses (prepared for oral delivery);

“(d) Dramatic or dramatico-musical compositions;

“(e) Musical compositions;

“(f) Maps;

“(g) Works of art; models or designs for works of art;

“(h) Reproductions of a work of art;

“(i) Drawings or plastic works of a scientific or technical character;

“(j) Photographs;

“(k) Prints and pictorial illustrations *including prints or labels used for articles of merchandise*;

“(l) *Motion-picture photoplays*;

“(m) *Motion pictures other than photoplays*:

“*Provided, nevertheless,* That the above specifications shall not be held to limit the subject-matter of copyright as defined in section four of this Act, nor shall any error in classification invalidate or impair the copyright protection secured under this Act.”

“Sec. 9. That any person entitled thereto by this Act may secure copyright for his work by publication thereof with the notice of copyright required by this Act; and

such notice shall be affixed to each copy thereof published or offered for sale in the United States by authority of the copyright proprietor, except in the case of books seeking ad interim protection under section twenty-one of this Act."

"Sec. 11. That copyright may also be had of the works of an author of which copies are not reproduced for sale, by the deposit, with claim of copyright, of one complete copy of such work if it be a lecture or similar production or a dramatic, musical, or *dramatico-musical* composition; *of a title and description, with one print taken from each scene or act, if the work be a motion-picture photoplay*; of a photographic print if the work be a photograph; *of a title and description, with not less than two prints taken from different sections of a complete motion picture, if the work be a motion picture other than a photoplay*; or of a photograph or other identifying reproduction thereof, if it be a work of art or a plastic work or drawing. But the privilege of registration of copyright secured hereunder shall not exempt the copyright proprietor from the deposit of copies, under sections twelve and thirteen of this Act, where the work is later reproduced in copies for sale."

"Sec. 25. That if any person shall infringe the copyright in any work protected under the copyright laws of the United States such person shall be liable:

"(a) To an injunction restraining such infringement;

"(b) To pay to the copyright proprietor such damages as the copyright proprietor may have suffered due to the infringement, as well as all the profits which the infringer shall have made from such infringement, * * *"

II.

Excerpts From Code of Federal Regulations of the
Copyright Office, Chapter II, Title 37 as Amended
to October 1, 1941.

“201.4—Subject matter of copyright.

* * * * *

“(b) Section 5 of the Act (35 Stat. 1076; 17 U. S. C. 5) names the thirteen classes of works for which copyright may be secured, as follows:

* * * * *

“(4) Dramatic and dramatico-musical compositions. Dramatic and dramatico-musical compositions, such as dramas, comedies, operas, operettas, and similar works.

“The designation ‘dramatic composition’ does not include the following: Dances, motion-picture shows; stage settings or mechanical devices by which dramatic effects are produced, or ‘stage business’; animal shows, sleight-of-hand performances, acrobatic or circus tricks of any kind; scenarios for, or descriptions of motion pictures or of settings for the production of motion pictures. * * *

“Dramatico-musical compositions include principally operas, operettas, and musical comedies, or similar productions which are to be acted as well as sung.”

* * * * *

“(12) Motion-picture photoplays. [No text.]

“(13) Motion pictures other than photoplays. [No text.]”

“201.6—Unpublished works. Unpublished works are such as have not at the time of registration been printed or reproduced in copies for sale or been publicly distributed. They include only the works enumerated in section 11 (35 Stat. 1078; 17 U. S. C. 11): Lectures, sermons, addresses, or similar productions for oral delivery; dramatic, musical, and dramatico-musical compositions; photographs; works of art (paintings, drawings, and sculptures); plastic works; motion-picture photoplays; and motion pictures other than photoplays.

“In order to secure copyright in such unpublished works, the following steps are necessary:

* * * * *

“(b) In the case of unpublished photographs, deposit one copy of the work. (Photo-engravings or photo-gravures are not photographs within the meaning of this provision.)

* * * * *

“(d) In the case of motion-picture photoplays, deposit a title and description, with one print taken from each scene or act.

“(e) In the case of motion pictures other than photoplays, deposit a title and description, with not less than

two prints taken from different sections of the complete motion picture.

* * * * *

“(f) Any work which has been registered under section 11, if published, *i. e.*, reproduced in copies for sale or distribution, must be deposited a second time (accompanied by an application for registration and the statutory fee) in the same manner as is required in the case of works published in the first place. [Rules 19-23.]”

“201.7—Published works * * *

“(b) Definition. Published works are such as are printed or otherwise produced and ‘placed on sale, sold, or publicly distributed.’ Works intended for sale or general distribution should first be printed with the statutory form of copyright notice inscribed on every copy published or offered for sale in the United States.

“The following works cannot be registered until after they have been published: Books, periodicals, maps, prints and pictorial illustrations. [Rules 24, 25.]”

III.

Background of Act of 1909.

The Copyright Act of 1790 gave protection only to books, maps, and charts. Protection was extended to dramatic compositions in 1856, and to any "photograph or negative thereof" in 1870.

Amdur, *Copyright Law and Practice* (1936), p. 94;
Edison v. Lubin, 3 Cir. (1903) 122 F. 240.

The statutory provision relative to dramatic compositions as it existed at the time of the passage of the Act of 1909 is found in Section 4952 of the Revised Statutes as amended on March 3, 1905.

Pertinent excerpts are as follows:

"The author, inventor, designer, or proprietor of any book, map, chart, dramatic or musical composition, engraving, cut, print or photograph, or negative thereof * * * shall, upon complying with the provisions of this chapter, have the sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing, and vending the same; and, in the case of a dramatic composition, of publicly performing or representing it, or causing it to be performed or represented by others."

Prior to the 1909 Act, unpublished dramas were not the subject matter of copyright. (See *Ferris v. Frohman* (1912), 223 U. S. 424.)

IV.

Legislative History of Copyright Act of 1909 and the Amendments of 1912.

1. The Revision of 1909.

(a) PRELIMINARY.

With the coming of the twentieth century, the copyright statutes had reached a chaotic state. Passed haphazardly from time to time, their condition was then described by President Roosevelt in his message to Congress in December 1905, as follows:

“Our copyright laws urgently need revision. They are imperfect in definition, confused and inconsistent in expression; they omit provision for many articles which, under modern reproductive processes, are entitled to protection; they impose hardships upon the copyright proprietor which are not essential to the fair protection of the public; they are difficult for the Courts to interpret and impossible for the Copyright Office to administer with satisfaction to the public * * * A complete revision of them is essential.” (Arguments before Joint Committee on Patents, 1906, p. 3; House Report No. 2222, reporting the 1909 revision to the 60th Congress, 2d Session, p. 1.)

The story of the 1909 revision appears in publications issued by the Government Printing Office in 1906 and 1908, the latter with a complete index, and known as *“Arguments before the Committee on Patents of the House of Representatives conjointly with the Senate Committee on Patents on H. R. 19853, on June 6, 7, 8 and 9, 1906, December 7, 8, 9, 10 and 11, 1906, and March 26, 27, and 28, 1908.”* As finally approved by the respective com-

mittees, the revision was reported to the 60th Congress, 2d Session, in House Report No. 2222 and Senate Report No. 1108 (the latter a reprint of the House Report) (p. 20).

(b) THE CONGRESSIONAL COMMITTEE HEARINGS OF
1908.

White-Smith Music Co. v. Apollo Co. (1908), 209 U. S. 1, was naturally a matter of great concern to the stage managers and producers and proprietors of copyrighted plays. They immediately organized, and when the joint hearings before the Committees on Patents were resumed on March 26, 1908, Mr. Ligon Johnson, an attorney representing the National Association of Theatrical Managers, appeared before the Committee, filed exhibits showing that he represented theatrical interests with an investment of over \$200,000,000, and claimed, as a result of the *White-Smith v. Apollo* decision, that the stage interests had no protection against the pirating of their plays in the making of moving pictures (Arguments, March 26, 1908, pp. 23-35). He thereupon recommended that the proposed text of what is now section 1(d), providing for public performance and exhibition of dramatic works, as carried down from the Act of 1856, be revised so as to include the making of an unauthorized motion picture film an infringement of the dramatic work from which it was taken, and, in this connection, suggested the following additional wording: "or to make any transcription or other record whatsoever thereof from which it may be reproduced, performed, or represented if it be a dramatic work." (Arguments, March 26, 1908, p. 24.)

Reading the form of section 1(d) of the 1909 Act will show that this amendment, offered by the theatrical managers in 1908, was accepted and enacted.

(c) COMMITTEE REPORT ON 1909 ACT.

The following is from the Committee Report (No. 2222):

“Subsection (a) of section 1 adopts without change the phraseology of section 4952 of the Revised Statutes, and this, with the insertion of the word ‘copy,’ practically adopts the phraseology of the first copyright act Congress ever passed—that of 1790. Many amendments of this were suggested, but the committee felt that it was safer to retain without change the old phraseology which has been so often construed by the courts.

“Paragraph (b) in the section contains certain new legislative features, but is consistent with the existing law as construed by the courts.¹

“Paragraph (c) is new, but is believed to be a wise provision, and it needs no explanation.

“There has been a good deal of discussion regarding subsection (d) of section 1. This section is intended to give adequate protection to the proprietor of a dramatic work. It is usual for the author of a dramatic work to refrain from reproducing copies of the work for sale.

¹But see, 18 C. J. S., p. 226; Chafee, “Reflections on the Law of Copyrights,” 45 *Columbia Law Review*, pp. 511-512.

He does not usually publish his work in the ordinary acceptance of the term, and hence in such cases never receives any royalty on copies sold. His compensation comes solely from public representation of the work. It has sometimes happened that upon the first production of a dramatic work a stenographer would be present and would take all the works down and would then turn the manuscript over to some one who had hired him to do the work or sell it to outside parties. This manuscript would then be duplicated and sold to persons who, without any authority whatever from the author, would give public performances of the work. It needs no argument to demonstrate how great the injustice of such a proceeding is, for under it the author's rights are necessarily greatly impaired. If an author desires to keep his dramatic work in unpublished form and give public representations thereof only, this right should be fully secured to him by law. We have endeavored to so frame this paragraph as to amply secure him these rights."

"Section 11 refers to copyright on works on which copies are not reproduced for sale, and deals with what shall be deposited as copies. It provides, however, that if the work is later reproduced in copies for sale, the copies themselves must be deposited. If the work be a photograph, the proprietor need not file a copy of the photograph, but merely a photographic print. If it be a work of art or a plastic work, he need not file a copy of that, but simply a photograph or an identifying reproduction thereof."

2. Amendments of 1912.

(1) PRELIMINARY.

Alarmed by the doctrine laid down in *Kalem Co. v. Harper Bros.*, 222 U. S. 55, which was affirmed by the Supreme Court in 1911 (the decision of the Circuit Court of Appeals had been handed down in 1908), the producers of motion pictures saw themselves faced with the possibility of enormous damages for *exhibiting*, or rather, *contributing to the infringing exhibitions by the exhibitors* operating thousands of theatres in the United States, if perchance the photoplay produced and distributed by them infringed upon a copyrighted novel or drama. (Hearings June 24, 1912, pp. 8-9.)

(2) COMMITTEE HEARINGS ON 1912 AMENDMENTS.

The representatives of the motion picture producers urged amendments to Section 25 of the Act of 1909 to limit damages for innocent infringement. (See Hearings, January 24, 1912, pp. 8, 9, 28.)

Pursuant to some purely administrative suggestions contained in some other bills and approved by the Register of Copyrights at the conclusion of the hearings (April 3, 1912, pp. 106-108), there was adopted in the final draft of the Townsend bill an amendment to section 5, adding a "*Class L*" and a "*Class M*" for respective motion picture photoplay and nonphotoplay registrations, and an amendment to section 11, making further administrative provisions with respect to registration of motion pictures. This amendment to section 5 did not thereby for the first time create, establish or secure the right of copyright for motion pictures. The Register of Copyrights, Mr.

Thorvald Solberg, in a report to the Librarian of Congress dated April 2, 1912, which he introduced for the record of the Committee hearing on April 3, 1912, (pp. 106-108), stated that:

"Copyright of Motion Pictures.—Motion pictures are now registered for copyright under the Act of Mar. 4, 1909 as 'photographs'." (p. 108).

(3) REPORT OF THE COMMITTEE ON 1912 AMENDMENTS.

The Report of the Committee deals with sections 5, 11, and 25.

The following is from the Report of the Committee (No. 756) on sections 5 and 11:

"Section 5 of said act provides that the application for registration shall specify to which of the classes named therein the work in which copyright is claimed belongs. The section as proposed in H. R. 24224 is an exact reenactment of the original section, with two classes of works added thereto, as follows:

"(1) Motion-Picture photoplays.

"(m) Motion pictures other than photoplays.

"The occasion for this proposed amendment is the fact that the production of motion-picture photoplays and motion pictures other than photoplays has become a business of vast proportions. The money invested therein is so great and the property rights so valuable that the committee is of the opinion that the copyright law ought to be so amended as to give to them distinct and definite recognition and protection. This it seeks to do, so far as

section 5 is concerned, by adding the two new classes above set forth.

“Section 11 of the copyright act provides for copyright of works, ‘of which copies are not reproduced for sale.’

“Section 11 as amended in H. R. 24224 is an exact reenactment of section 11 of the present law, with the additional language as hereinafter indicated. [The additions are indicated. They are shown in italics, Brief, p. 3.]

“This language is necessary to enlarge section 11 so as to provide for the two new classes added to section 5, as above referred to. It serves no other purpose and is intended to have no other effect.”

(4) THE DEBATE IN CONGRESS ON JUNE 17, 1912.

The bill was called up for debate “by unanimous consent” on June 17, 1912, after the Committee had recommended its passage in House Report No. 756. The entire debate on the bill took place that day, and appears on but five pages of the Congressional Record (Cong. Rec., House 62d Cong. 2d Sess. pp. 8288-8292). It relates entirely to the interpretation of Section 25.

IN THE
United States Circuit Court of Appeals

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Appellants,

v.

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Appellee.

HAROLD LLOYD CORPORATION, a California corporation,

Appellant,

v.

UNIVERSAL PICTURES COMPANY, INC., a Delaware Corporation and CLYDE BRUCKMAN,

Appellees.

**REPLY BRIEF FOR APPELLANT AND CROSS-APPELLEE
UNIVERSAL PICTURES COMPANY, INC.**

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I.

The alleged infringing material comprises only six "gags" or pieces of "stage business".

In its brief (p. 3) plaintiff cites the finding (Finding VII, Tr. p. 34) that defendants copied "fifty or more consecutive scenes". One of the specifications of error in the brief of defendant Universal is (p. 41) "The District Court erred in finding" (Finding VII, Tr. p. 34) "that the alleged similarity in the material consisted of more than six 'gags' or pieces of 'stage business'; that the entire magician's coat comedy routine in defendant's picture represented more than 6 minutes and 1 second of the running time of 63 minutes and 21 seconds of defendant's

picture". There is no evidence in the transcript to support this erroneous finding. The evidence established that there was a similarity in only six "gags" or pieces of "stage business" (Deft. Universal's Brief, pp. 5, 6). Plaintiff stipulated, that the entire magician's coat comedy routine in defendant's picture (including both the alleged infringing material and all additional original material) represented only 6 minutes and 1 second of the running time, of 63 minutes and 21 seconds of defendant's picture (Tr. p. 385).

II.

The court properly excluded the evidence of the transaction involving the motion picture "The Milky Way."

The Court excluded plaintiff's offer of proof, as to the alleged consideration paid by Samuel Goldwyn to Paramount Pictures, Inc. for rights to its motion picture "The Milky Way". This offer was excluded, upon the ground that this motion picture was not comparable to plaintiff's motion picture "Movie Crazy" (Tr. pp. 377, 378). The Court's ruling is supported by the following:

(1) While Lloyd first testified that the "re-make" rights to one of his pictures "The Milky Way" had been sold (Tr. p. 136), he later admitted that the picture "doesn't belong to me" (Tr. p. 354) and that it had only been acquired from Paramount as "a guide" for another picture, and not for "re-make" (Tr. p. 368).

(2) Lloyd testified that the sale of re-make rights to any old motion picture was not a "common practice in the industry" (Tr. p. 369).

(3) Plaintiff's experts Lloyd (Tr. pp. 363, 364) and Botsford (Tr. pp. 469, 470) confirmed the testimony of defendant's expert Hirleman (Tr. pp. 434, 437-440, 448) that such old pictures as had been sold for re-make, were all based upon famous novels or stage plays, as distinguished from plaintiff's picture "Movie Crazy" containing a story and situation

comedy material, specially written for the personality of a particular comedian, and that in the entire history of the industry no old picture of the latter type had ever been re-made. In this connection, Lloyd testified that "The Milky Way" had not been written for him, but was based upon a stage play (adapted from a novel) which had a long run at the Cort Theatre in New York City (Tr. pp. 369-371), and that the only picture of the other type (written for a particular comedian) which in his opinion might be successfully re-made, was Chaplin's picture "The Gold Rush" (Tr. p. 364). Accordingly, any amount received by Paramount for rights to its picture "The Milky Way" (based upon both a novel and stage play) would supply no basis for comparison, or computation of the profits that plaintiff or some other producer might realize, if they ever should re-issue or re-make plaintiff's picture (written for a particular comedian) (See cases cited, Deft. Universal's Brief, pp. 53-61).

III.

Plaintiff's argument that there need be no factual basis for the court's award of damages in any arbitrary sum, is untenable.

In support of this argument, plaintiff cites *Sinclair Refining Co. v. Jenkins*, 289 U. S. 689 (53 Sup. Ct. 736, 77 Law Ed. 1449) and *Palmer v. Connecticut Ry. Co.*, 311 U. S. 544 (61 Sup. Ct. 379, 85 Law Ed. 336), both of which decisions are misinterpreted by plaintiff.

In the *Sinclair* case the action was to recover damages for the breach of a contract to assign a patent. The court held that the damages could not be arrived at by conjecture, and that the proper measure of damages could only be determined in such a case by ascertaining the use to which the patented article had been put and the benefits that accrued from such use, and thereby put the buyer in as good a position as though the seller had performed,

the Court saying (pp. 697, 698):

“The use that has been made of the patented device is a legitimate aid to the appraisal of the value of the patent at the time of the breach.

* * * Experience is then available to correct uncertain prophecy. Here is a book of wisdom that courts may not neglect. We find no rule of law that sets a clasp upon its pages, and forbids us to look within.”

In the later case of *U. S. v. Safety Car Heating Co.*, 297 U. S. 88, 98 (56 Sup. Ct. 353, 80 Law Ed. 500), Mr. Justice Cardozo, who wrote the unanimous opinion of the Court in the *Sinclair* case, explained the purport of the decision in that case:

“In the second place, a claim for damages like one for an infringer’s profits is too contingent and uncertain to have a determinable market value when the validity of the patent is unsettled and contested and the factors making up the damage are arrived at by conjecture. *Sinclair Refining Co. v. Jenkins Petroleum Co.*, 289 U. S. 689, 697.”

The implication of the decision has likewise been stated in the following cases:

Horvath v. McCord Radiator & Mfg. Co., 100 Fed. (2d) 326, 336 (Cert. den. 308 U. S. 581, 60 Sup. Ct. 101, 84 Law Ed. 486) (Cir. Ct., 6th Cir.):

“Expert testimony to be of value must yield to or agree with actual experience of the patentee and other users of the patented device and the damage allowed to Horvath must find its premise in the use to which his machine has been put and the benefits ensuing to its users. *Sinclair Refining Company v. Jenkins Petroleum Process Co.*, supra.”

Guggenheim v. Helvering, 117 Fed. (2d) 469, 473 (cert. den. 314 U. S. 621, 62 Sup. Ct. 66, 86 Law Ed. 499) (Cir. Ct., 2d Cir.):

“In *Sinclair Refining Co. v. Jenkins Petroleum Process*, supra, the court was passing upon the dam-

ages suffered by a promisee from the breach of a contract to assign a patent, and held that it was proper to look to what the seller had earned by exploiting it after the breach. There the test was that amount which would put the buyer in as good position as though the seller had performed, and the best way to learn that would have been to wait and see what the patent actually brought in."

In the *Palmer* case, the action was by a lessor to recover damages for the rejection of a long term lease. The Court applied the settled rule of law, that past earnings of an established business give a reasonable basis for determining future earnings for a limited period, saying (pp. 556, 557, 559-562) (Appen. p. i).

In its prior decision in the same case, *Connecticut Ry. Co. v. Palmer*, 305 U. S. 493, 505 (59 Sup. Ct. 316, 83 Law. Ed. 309) the Court had said to the same effect:

"It is well understood that such evidence must show damages to reasonable certainty. Mere 'plausible anticipation' does not merit consideration nor are flights into the realm of pure speculation entitled to be treated as evidence. The determination of the amount to be allowed as the damage will be based on evidence which satisfies the mind."

In its later decision in *Union Pacific Railroad Co. v. United States*, 313 U. S. 450, 474 (61 Sup. Ct. 1064, 85 Law. Ed. 1453), the Court said as to the purport of its decision in the *Palmer* case:

"When enough evidence is offered to justify a conclusion based upon judgment and not guesswork, the requirements of the judicial process are met. Cf. *Palmer v. Connecticut Ry. & Lighting Co.*, 311 U. S. 544, 559, and cases cited."

In *Red Jacket Oil & Gas Co. v. United Fuel Gas Co.*, 146 Fed. (2d) 645, 649, 650 (Cir. Ct., 4th Cir.), the Court in citing and following the *Palmer* case, said to the same effect:

"It is our considered view that Jacket's case falls down here from a failure to produce adequate evidence to prove, with that reasonable certainty which the law requires, the existence, the nature and the extent of the damages which it here claims to have suffered. Jacket has in truth introduced a vast mass of evidence. This is not lacking in quantity; it is lacking in quality. In all the chaff, there is little wheat. * * * And, under these circumstances, those answers cannot be left to pure conjecture, to mere speculation or to unfounded hypothesis.

* * * * *

See, also, *Palmer v. Connecticut Railway & Lighting Co.*, 311 U. S. 544, 560-562, 61 S. Ct. 379, 85 L. Ed. 336. In the American Law Institute's Restatement of the Law of Contracts, Vol. 1, § 331, it is said: 'Damages are recoverable for losses caused and other gains prevented by the breach, only to the extent that the *evidence affords a sufficient basis for estimating their amount in money with reasonable certainty.*' (Italics ours.) See, also, 15 Amer. Jur. 'Damages' § 20, p. 410; 78 A. L. R. 858."

The required objective of plaintiff's proof was not the present value of the rights to plaintiff's picture, but what damage it has suffered by the alleged infringement.

Palmer v. Connecticut Ry. Co., *supra* (cited by pltf. p. 19), at page 557:

"The final objective of the proof is not how much the remainder is worth now but what damages the lessor has suffered."

The only testimony adduced by plaintiff as to its alleged damage was "I would say it has been destroyed" (Lloyd, Tr. pp. 104, 105), "I think it lost 90 per cent of its value" (Bentel, Tr. p. 203), "I wouldn't think it would be very good for re-issue or re-make now" (Botsford, Tr. p. 18). The Court held that it could not accept plaintiff's estimation of its damage, that it was not impressed with the claim that the value of its picture was destroyed, and "I feel that

that picture still has and will continue to have certain value after a lapse of a reasonable length of time" (Tr. p. 522). So that the only question is, what if any damage plaintiff has suffered. There can be no possible basis of support for any estimation of such damage, to a picture that has been out of circulation since 1935, and concededly is the type of picture that has never been and never could be revived. Lloyd testified that he felt he was damaged because if the picture ever was revived "they would probably class me as an imitator and they would be tired of seeing the scenes" (Tr. p. 150). But that does not establish damage. Can it be said that any given number of people, or even one single person, would not see the picture because these six "gags" or pieces of "stage business" had been previously used in another picture? How could anyone, upon the basis of reason or experience, estimate such lessened attendance, if the picture ever was revived? Even in the case of a new and untried business, possibly the experience in a similar business might afford some guide, no matter how uncertain. Yet the Courts have never sanctioned an award of damage in such a case, upon the ground that it was mere conjecture and guesswork. In this case there was no evidence of even a parallel situation.

The Court awarded damages in the arbitrary sum of \$40,000 upon the erroneous assumption that "the general rule of damages is that somebody picks something out of the thin air * * *" (Tr. p. 244). "I realize that counsel argues that is a speculative question * * *. It is the same thing as a personal injury case. * * * They reach out and pick some figure out of the sky and that is the damages and that is all there is to it" (Tr. p. 480).

Plaintiff proceeds upon the same assumption, that it is not a matter of actual fact proof, but of picking a figure "out of the thin air." Thus (p. 31) "That amount, as we have previously indicated, should, in our opinion, be *at least* \$250,000," as though all it amounts to is to select any figure with sufficient naughts. In fact, plaintiff finds fault (pp. 29-31) that the Court added only one naught too many, in awarding \$40,000 instead of \$4,000 (20% of the profits of \$20,517.28).

IV.

Plaintiff having stipulated as to the amount of the profits of defendant's picture, there is no support for its argument, that as both the damages and profits are difficult of ascertainment plaintiff should be awarded statutory damages.

The record is devoid of any factual evidence to support the Court's award of *actual* damages in the sum of \$40,000. Plaintiff being unable to cite any authority to support such an award, concedes that its damages are "difficult of ascertainment" and then argues that it is entitled to statutory damages, saying (p. 43) "Where Damages as Well as Profits Are Difficult of Ascertainment the Court Should Award Statutory Damages in Such Sum as Shall Appear to be Just—" In this connection plaintiff contends (pp. 16, 17) that as the evidence established the number of theatres in which defendant's picture played, the Court can take judicial notice of the number of performances, and award statutory damages:

"It is plaintiff's contention that general damages might properly be found by a court predicated upon evidence of the nature and value of plaintiff's property; the scope and extent of its misappropriation, and proof of the number of infringing performances in theatres in which the plaintiff's property has been used without its consent. (See *United States Frumentum Co. v. Lauhoff*, 6th C. C. A., 216 Fed. 610, * * *")

The difficulty with plaintiff's position is, that it stipulated upon the trial that the profits of defendant's picture were \$20,517.28 (Tr. pp. 474-477, Deft's. Ex. I).

Sec. 25 (b) Copyrights, 17 U. S. C. (Act of March 4, 1909, Ch. 320, 35 Stat. 1081; Aug. 24, 1912, Ch. 356, 376 Stat. 489) provides in part, that the infringer shall be liable:

"To pay to the copyright proprietor such damages as the copyright proprietor may have suffered due to the infringement, as well as all the profits which the infringer shall have made from such infringement, * * * or in lieu of actual damages and profits such damages

as to the court shall appear to be just, and in assessing such damages the court may, in its discretion, allow the amounts as hereinafter stated * * *."

In *Westermann Company v. Dispatch Printing Company*, 249 U. S. 100, 106 (39 Sup. Ct. 194, 63 Law Ed. 499), the Court said as to the above quoted provision:

"The fact that these damages are to be 'in lieu of actual damages' shows that something other than actual damages is intended—that another measure is to be applied in making the assessment."

Thus, under the Copyright Statute the Court can only award statutory damages, in the absence of proof of "*actual* damages and profits."

Sec. 70, Patents, 35 U. S. C. (Revised Statutes, Sec. 4921; March 3, 1897, Ch. 391, Sec. 6, 29 Stat. 894; Feb. 18, 1922, Ch. 58, Sec. 8, 42 Stat. 392) provides to the same effect: (Appen., p. ii).

Thus, under the Patent Statute, the Court can only award such statutory damages or so-called "general damages" (referred to as the "reasonable royalty rule") when the actual damages "are not susceptible of calculation and determination with *reasonable certainty*."

The "in lieu" clause of Sec. 25 (b) Copyrights is a substitute for the "general damage" or "reasonable royalty rule" under Sec. 70 Patents.

Widenski v. Shapiro, Bernstein & Co., Inc., 147 Fed. (2d) 909, 911 (Cir. Ct. 1st Cir.): (Appen., p. ii).

When plaintiff speaks of "general damages" in citing *United States Frumentum Co. v. Lauhoff, supra* (patent infringement), he has reference to the statement of the Court, that in the absence of proof of actual damages or sales, plaintiff could recover what (p. 617) "is frequently spoken of as a 'reasonable royalty'; and this phrase is a convenient means of naming this particular kind of damage. It may also be well called 'general damage'; * * *."

Accordingly, the "general damage" referred to in that case, are the statutory damages which can only be awarded in a patent case, when neither damages nor profits can be calculated with reasonable certainty (Sec. 70 Patents).

A. The application of the "reasonable royalty" rule is now governed by Sec. 70 Patents, and is only applicable when neither damages nor profits can be calculated with reasonable certainty.

Egry Register Co. v. Standard Register Co., 23 Fed. (2d) 438, 442 (Cir. Ct., 6th Cir.) citing *U. S. Frumentum Co. v. Lauhoff*, *supra*:

"The plaintiff having suffered a plain injury, and not having been able to make satisfactory proof of damages, and not being entitled to all the defendant's profits, and not being able to make an intelligent apportionment, we find here a clear instance of that class of cases discussed in *U. S. Frumentum Co. v. Lauhoff* (C. C. A.) 216 F. 610, 615, where the award of a reasonable royalty is the only solution of the difficulty. * * * Much of the doubt formerly existing as to when a case was fit for the application of this measure of damage is removed by the Act of February 18, 1922, § 8, embodied in U. S. Code, tit. 35, § 70; * * *."

Wallace & Tiernan Co. v. City of Syracuse, 45 Fed. (2d) 693, 694, 695 (Cir. Ct., 2d Cir.), citing *United States Frumentum Co. v. Lauhoff*, *supra*:

"It is conceded that the defendant got no profits from using the patented invention, so that the case is one for damages only. Section 70 of title 35, U. S. Code (35 U. S. C. A. § 70), provides that if the plaintiff in a suit for infringement has suffered damage, 'but that such damages * * * are not susceptible of calculation and determination with reasonable certainty,' the court may resort to a reasonable royalty. Before it was enacted, the rule had not been different (*Hunt, etc., Co. v. Cassiday*, 64 F. 585 [C. C. A. 9]; *Munger v. Perlman Rim Corp.*, 275 F. 21 [C. C. A. 2]; *U. S. Frumentum Co. v. Lauhoff*, 216 F. 610, 616 [C. C. A. 6]; *Jones v. Sykes Metal Lath Co.*, 254 F. 91 [C. C. A. 6]); * * * it does not clearly appear whether the plaintiff's putative profits were comput-

able. Be that as it may, there can be no doubt since the passage of the statute that it is necessary to show this before a reasonable royalty can be awarded."

Collins v. Hupp Motor Car Corporation, 22 Fed. (2d) 27, 31 (Cir. Ct., 6th Cir.), citing *U. S. Frumentum Co. v. Lauhoff*, *supra*:

"The award was on the basis of a 'reasonable royalty,' it appearing that, while plaintiffs had been damaged by, and defendant had profited from, the infringement, the amount of neither profit nor damages could be calculated with reasonable certainty. No established uniform rate of royalty had been adopted or used. The resort to reasonable royalty was eminently proper. *Dowagiac Co. v. Minnesota Co.*, 235 U. S. 641, 648, 35 S. Ct. 221, 59 L. Ed. 398; *U. S. Frumentum Co. v. Lauhoff* (C. C. A. 6) 216 F. 610; *Clark v. Schieble* (C. C. A. 6) 248 F. 276; *K-W Ignition Co. v. Temco Co.* (C. C. A. 6) 283 F. 873, 877."

Krentler-Arnold Hinge Last Co. v. Leman, 24 Fed. (2d) 423, 424, 425, citing *U. S. Frumentum Co. v. Lauhoff*, *supra*: (Appen. p. iii).

To the same effect:

Standard Brands, Inc. v. Federal Yeast Corporation, 38 Fed. (2d) 314, 322;

Widenski v. Shapiro, Bernstein & Co., Inc., 147 Fed. (2d) 909, 911 (Cir. Ct. 1st Cir.);

Enterprise Mfg. Co. v. Shakespeare Co., 141 Fed. (2d) 916, 919, 920 (Cir. Ct., 6th Cir.).

B. Like under the patent statute, statutory damages can only be awarded under Sec. 25 Copyrights, in a case where the rules of law render difficult or impossible proof of actual damages or discovery of profits.

In its brief (p. 5) plaintiff cites the decision of this Court in *Turner & Dahnken v. Crowley*, 252 Fed. 749, as holding to the contrary. Such is not the fact. This Court said (p. 754) "the discretion of the court may be used to award damages where no proof of actual damage is offered".

Thus in *Davilla v. Brunswick-Balke Collender Co. of New York*, 94 Fed. (2d) 567, 570, cert. den. 304 U. S. 572, 58 Sup. Ct. 1040, 82 Law Ed. 1536 (Cir. Ct., 2d Cir.) the Court cited the decision of this Court in *Turner & Dahnken v. Crowley*, *supra*, as authority for the point:

“Since the amount of the sales was sufficiently proved, there was no basis for an award of statutory damages. Such an award should not be based upon the idea of punishment, but depends upon the absence of proof of actual profits and damages. *Turner & Dahnken v. Crowley*, 9 Cir., 252 F. 749, 754; *Westermann Co. v. Dispatch Printing Co.*, 249 U. S. 100, 39 S. Ct. 194, 63 L. Ed. 499.”

It is the now established rule of law.

Douglas v. Cunningham, 294 U. S. 207, 209 (55 Sup. Ct. 365, 79 Law Ed. 862):

“The phraseology of the section was adopted to avoid the strictness of construction incident to a law imposing penalties, and to give the owner of a copy-right some recompense for injury done him, in a case where the rules of law render difficult or impossible proof of damages or discovery of profits.”

Sheldon v. Metro-Goldwyn Corp., 309 U. S. 390, 399 (60 Sup. Ct. 681, 84 Law Ed. 825):

“We agree with petitioner that the ‘in lieu’ clause is not applicable here, as the profits have been proved and the only question is as to their apportionment.”

Washingtonian Pub. Co., Inc. v. Pearson, et al., 140 Fed. (2d) 465, 466 (Cir. Ct., Dist. of Col.):

“Since the ‘in lieu’ clause is not intended as a penalty, the court was right in awarding no damages. That clause ‘was adopted * * * to give the owner of a copyright some recompense for injury done him, in a case where the rules of law render difficult or impossible proof of damages or discovery of profits.’ It is not applicable here, first because there was no ‘injury done’ to appellant and second because ‘the

profits have been proved * * *,’’ citing *Douglas et al v. Cunningham, et al.*, 294 U. S. 207, 209; *L. A. Westermann Co. v. Dispatch Printing Co.*, 249 U. S. 100, 108; *Sheldon v. Metro-Goldwyn Pictures Corp.*, 309 U. S. 390, 399; *Davilla v. Brunswick-Balke Collender Co.*, 94 Fed. (2d) 567.

To the same effect:

Jewell-LaSalle Realty Company v. Buck, 283 U. S. 202, 206 (51 Sup. Ct. 407, 75 Law Ed. 978);

Sammons v. Colonial Press, Inc., 126 Fed. (2d) 341, 350 (Cir. Ct., 1st Cir.).

V.

If damages are proven and the profits ascertained, the statute does not permit recovery of both, but gives the plaintiff his choice i. e., the profits plus any damages in excess thereof.

The Court said in *Sheldon v. Metro-Goldwyn Corp.*, *supra* (pp. 400, 401): (Appen. p. iv).

Plaintiff argues (p. 41) that the *Sheldon* case cannot be considered as having determined that a plaintiff was only entitled to recover damages or profits, “whichever was the greater”, because its decision was “predicated solely upon a House Committee Report * * * which was incidentally referred to by the Court”. Plaintiff further argues that the Report only had reference to decisions up to 1909.

If it can possibly be said that there is any such doubt, this doubt was definitely removed in the later case of *Mishawaka Mfg. Co. v. Kresge Co.*, 316 U. S. 203, 208 (62 Sup. Ct. 1022, 86 Law Ed. 1381):

“If the petitioner suffered damages beyond the loss of profits the decree should provide for the assessment of such damages.”

This is the settled rule of law.

Goodyear Tire & Rubber Co. v. Overman Cushion Tire

Co., 95 Fed. (2d) 978, 983 (Cir. Ct., 6th Cir.):

“The statute does not allow recovery of profits plus damages, but gives the patentee his choice or what is, in substance, the same, the profits plus any damages in excess thereof. Rev. Stat. § 4921 as amended, 35 U. S. C. A. § 70; *Birdsall v. Coolidge*, 1876, 93 U. S. 64, 69, 23 L. Ed. 802; *Tilghman v. Proctor*, 1888, 125 U. S. 136, 148, 8 S. Ct. 894, 31 L. Ed. 664; *Baseball Display Co. v. Star Ballplayer Co.*, 3 Cir., 1929, 35 F. 2d 1; *Krentler-Arnold Hinge Last Co. v. Leman*, D. C. Mass., 1928, 24 F. 2d 423; *Expanded Metal Co. v. General Fireproofing Co.*, D. C. N. D. Ohio, 1917, 247 F. 899. Only in *Dowagiac Mfg. Co. v. Deere & Webber Co.*, 8 Cir., 1922, 284 F. 331, were both profits and the lesser damages allowed.”

(Thus the Court in the *Goodyear* case points out, that *Dowagiac Mfg. Co. v. Deere & Webber Co.*, 284 Fed. 331 (upon which plaintiff relies, p. 41) is the only case to the contrary, and has never been followed.)

Underwood Typewriter Co. v. E. C. Stearns & Co., 227 Fed. 74, 82 (Cir. Ct., 2d Cir.):

“Indeed, the fact that no profits were made may make it less difficult to assess the damages, as the law does not permit a duplication in damages of what has been received in the shape of profits. *Yesbera v. Hardesty Manufacturing Co.*, supra.”

This rule of law was tersely enunciated by this Court in *Riverside Heights Orange Growers' Ass'n. v. Stebler*, 240 Fed. 703, 715 (Cir. Ct., 9th Cir.): (Appen. p. iv).

This Court held to the same effect in *Pedersen v. Dundon*, 220 Fed. 309, 312 (Cir. Ct., 9th Cir.) and later in *New England Fibre Blanket Co. v. Portland Telegram*, 61 Fed. (2d) 648, 650 (cert. den. 289 U. S. 752, 53 Sup. Ct. 696, 77 Law Ed. 1497) (Cir. Ct., 9th Cir.).

It has been the settled law prior to and since 1909.

Birdsall v. Coolidge, 93 U. S. 64, 69 (23 Law Ed. 802);

- Root v. Railway Co.*, 105 U. S. 189, 212 (26 Law Ed. 975);
- Tilghman v. Proctor*, 125 U. S. 136, 148, 149 (8 Sup. Ct. 894, 31 Law Ed. 664);
- Simpson v. Davis*, 22 Fed. 444, 445;
- Hammacher v. Wilson*, 32 Fed. 796, 797;
- Beach v. Hatch*, 153 Fed. 763, 764;
- Yesbera v. Hardesty Mfg. Co.*, 166 Fed. 120, 127, 128 (cert. den. 214 U. S. 513, 29 Sup. Ct. 696, 53 Law Ed. 1063);
- Peerless Brick Mach. Co. v. Miracle Pressed Stone Co.*, 181 Fed. 526, 530 (1910);
- Metallic Rubber Tire Co. v. Hartford Rubber Works Co.*, 245 Fed. 860, 866, 867 (1917) (cert. den. 257 U. S. 650, 42 Sup. Ct. 57, 66 Law Ed. 416);
- Expanded Metal Co. v. General Fireproofing Co.*, 247 Fed. 899, 901, 902 (1917);
- Baseball Display Co., Inc. v. Star Ballplayer Company, Inc.*, 35 Fed. (2d) 1, 3 (Cir. Ct., 3rd Cir., 1929);
- Swan Carburetor Co. v. Nash Motors Co.*, 133 Fed. (2d) 562, 563 (Cir. Ct., 4th Cir., 1943, cert. den. 320 U. S. 762, 64 Sup. Ct. 36, 88 Law Ed. 454).

VI.

Plaintiff's contention that it is impossible to apportion the profits due to the infringement is contrary to the rule of law of the *Sheldon* case.

In *Sheldon v. Metro-Goldwyn Corp.*, *supra* (p. 408), the Court held that twenty per cent was a proper apportionment of profits for the contribution of an infringing screen play. Plaintiff, however, is not in accord:

“Mr. Fendler: Under the copyright act we do claim that we are entitled to both damages and profits, but we do not believe in view of the fact that the Copyright Act requires the profits to be ascribed to that portion of the infringing—to the infringement

that any apportionment of profits is possible.” (Tr. pp. 472, 473.)

“The Court: If there is any question about it I will listen to any testimony you care to offer. If Mr. Fendler contends he is entitled to more than 20 per cent he can put on his evidence to that effect.

Mr. Fendler: No, if your Honor please. The evidence I propose to offer is that it is impossible to apportion profits to the infringement.

The Court: Of course even in the *Sheldon* case, when you come right down to it, it was found impossible to apportion the profits, but the court in its judgment made an apportionment. You have all the elements in this case that you have in any moving picture.” (Tr. p. 474.)

Plaintiff likewise argues that there is no evidence to support the Court’s apportionment of twenty per cent. Defendant’s counsel has read the record on appeal in the case of *Stonesifer v. Twentieth Century-Fox Film Corporation*, 48 Fed. Supp. 196. There was no evidence offered in that case in support of the apportionment. The precise procedure was followed as in the instant case, of offering in evidence an itemized statement of the film’s cost (including costs of production, prints and distribution) and of the film rentals and net profit. In the instant case plaintiff likewise stipulated that the statement (Deft’s Ex. 1) correctly reflected a net profit of \$20,517.28 (Tr. p. 475). In the *Stonesifer* case the Court recognized the determination in the *Sheldon* case as a rule of law, in making an apportionment of twenty per cent, without any supporting evidence. This Court (140 Fed. (2d) 579, 583, 584) affirmed the award upon the authority of the *Sheldon* case, saying: (Appen. p. v).

Even assuming that irrespective of the ruling in the *Sheldon* case, evidence should be adduced in this case to establish the portion of the profits due to the infringement, the Court had said (at the first session of the trial) that if the question should arise, it would be sent to a master

for determination (Tr. pp. 299, 300). When the Court said to the contrary (at the later session) that it did not intend to refer such matter, defendant's counsel pointed out that by reason of this understanding it was not prepared to offer such proof, assuming that it was required (Tr. pp. 470-474). Under the circumstances, if this Court should determine that the proof is required, defendant should have the opportunity of offering such proof before a master.

VII.

The recovery, if any, should be nominal.

(1) Plaintiff's picture, which was released in 1932, had not been exhibited since 1935 (Tr. p. 190), and as the Court said "In other words, it has been on the shelf since then" (Tr. p. 70).

(2) Plaintiff's witnesses Leo and Bentel confirmed the testimony of defendant's witness Hirleman, that plaintiff's picture was dated and old-fashioned and would not be a present day box office draw (Tr. pp. 209, 221, 425).

(3) None of plaintiff's pictures had ever been re-made (Tr. pp. 136, 354). Plaintiff had never re-issued any of its pictures (Tr. p. 136). The re-issue rights had been sold to only one of its pictures, for which only \$3,500 was paid. It had no value, as not one exhibitor would take the picture because there was no demand for the re-issue or re-make rights of any old pictures of this type (Tr. pp. 354, 428-430, 460).

(4) Lloyd testified that the sale of such rights to any old pictures was not a common practice in the industry (Tr. p. 369). Plaintiff's witnesses Lloyd (Tr. pp. 363, 364) and Botsford (Tr. pp. 469, 470) confirmed the testimony of defendant's expert Hirleman (Tr. pp. 434, 437-440, 448), that no picture of this type, where the story and comedy material was specially written for the personality of a particular comedian (as distinguished from a picture based upon a famous novel or stage play) had ever been re-made. Lloyd likewise conceded that the only picture of this type

which in his opinion might be successfully re-made, was Chaplin's picture "The Gold Rush" (Tr. p. 364). This evidences that the rights to plaintiff's picture are valueless, which accounts for the fact that no such rights have ever been exercised or disposed of.

(5) The alleged infringing material comprises only six "gags" or pieces of "stage business", which had been in common use for many years prior to plaintiff's use, in other motion pictures and magician comedy routines, and was stock material (Tr. pp. 320-326, 310-313, 316, 317). Lloyd conceded that it was merely a sequence of "gags" (Tr. p. 137). Such material had always been considered common property for use in comedy routines, this being the first instance that an exclusive right had ever been asserted to this type of material (Tr. pp. 310-313, 316, 317, 330, 331, 338, 340).

(6) The same "gags" and "stage business" had been previously used by plaintiff in another picture, and deleted because of over-footage (Tr. p. 73). The Court said that "it was no part of the general theme", was merely "cut into the picture" for comedy accretion (Tr. pp. 142, 143), and was "a part of the whole that could be lifted out" without affecting the picture (Tr. pp. 139, 141).

(7) The same "gags" or "stage business" had been previously used by Columbia in its picture (which had been generally released throughout the United States and continued to be exhibited to the time of trial), without plaintiff's authorization or objection, upon the like assumption that it was common property, the Columbia picture having been exhibited in more theatres than defendant's picture (Tr. pp. 61, 90, 154, 390, 391, 397). The Court held that the Columbia picture unquestionably affected plaintiff's recovery against this defendant (Tr. p. 521).

(8) Defendant established that it was not aware that it was infringing and that such alleged infringement could not have been reasonably foreseen (Tr. pp. 235-238, 310-313, 316, 317, 321-326, 330-332, 335-340). Although defendant's picture had been generally released and ex-

hibited throughout the United States since December 3, 1943 (Tr. p. 384), of which plaintiff concededly had knowledge (Tr. pp. 152, 153), plaintiff deliberately withheld notice of its alleged claim until March 20, 1934 (Tr. pp. 385, 386) after the picture had virtually had its run. This evidences that plaintiff had no desire to protect the alleged value of its picture, and was only interested in establishing a basis for a financial recovery. It was stipulated that the exhibition of defendant's picture was stopped immediately upon receipt of the notice (Tr. pp. 385-387), so that no question of defendant's good faith can be imputed.

As was said in the leading case of *Fred Fisher, Inc. v. Dillingham*, 298 Fed. 145, 152 (Dist. Ct., S. D. N. Y., L. Hand, D. J.):

"As for damages, it seems to me absurd to suggest that it has suffered any injury. 'Dardanella' had faded out before 'Kalua' appeared; but, if it had been at the peak of its popularity, I do not believe that the accompaniment to the chorus of 'Kalua' would have subtracted one copy or one record from its sales. The controversy is 'a trivial pothor' (Hough, J., dissentiente in *Jewelers', etc., Co. v. Keystone Pub. Co.* (C. C. A.) 281 Fed. 83, 95), a mere point of honor, of scarcely more than irritation, involving no substantial interest. * * *

* * * The plaintiff is likewise absolutely entitled to a full bill of costs, but I will make no allowance for counsel fees, since that is discretionary. Such victories I may properly enough make a luxury to the winner."

To the same effect:

Insurance Press v. Ford Motor Co., 255 Fed. 896, 897 (Cir. Ct., 2d Cir.):

"I feel reasonably sure that the complainant has suffered a very small amount of damages, and that the defendant has secured a very trifling advantage by

the publication of the article in the automobile trade, and under the circumstances, shall award the sum of \$250 to the complainant, in addition to costs and a counsel fee of \$100.”

CONCLUSION

See Conclusion (p. 78) Defendant Universal's Opening Brief.

Respectfully submitted,

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APPENDIX

Argument III

(P. 5) *Palmer v. Connecticut Ry. Co.*, 311 U. S. 544, 556, 557, 559-562 (61 Sup. Ct. 379, 85 Law Ed. 336):

“The petitioner contends, however, that evidence of rental value for a 40-year period, no matter how certain it may be, is inadequate to enable a court to establish the damages for the entire 969 remaining years. Its argument is that one cannot be sure the truncated portion will not show sufficient gain to absorb all losses. Since certain proof for distant years cannot be produced, this objection leaves the lessor to qualified opinion evidence as to annual rental value, discounted for the term to show present damage. * * * While such evidence is admissible for consideration in forming a judgment upon damages, it has little, if any, probative force beyond the immediate years. Certainly such opinion evidence alone cannot be permitted to fix rental value for purposes of damages in the indefinite future. The final objective of the proof is not how much the remainder is worth now but what damages the lessor has suffered.

* * *

All that can be done is to place before the court such facts and circumstances as are available to enable an estimate to be made based upon judgment and not guesswork. * * *

The proof of future profits by the evidence of past profits in an established business gives a reasonable basis for a conclusion. * * * Nothing is more indicative of their value for lease or sale of the fee than past earnings. * * * Evidence of value would be made up of the items of proof. One of the most important of these, in the case of property such as here involved, would be past earnings.

This Court has sustained recoveries for future profits over four years based solely upon evidence of the profits of an established business for the past four years.

* * *

Certainty in the fact of damage is essential. Certainty as to the amount goes no further than to require a basis for a reasoned conclusion. * * *

Satisfactory evidence was presented for the three years of actual operation of the properties covered by this lease. We think that prior earnings of the same property over fourteen years was a fair base to use to project the estimate of the earnings for the eight years of future operation.”

Argument IV

(P. 9) Sec. 70, Patents, 35 U. S. C. (Revised Statutes, Sec. 4921; March 3, 1897, Ch. 391, Sec. 6, 29 Stat. 894; Feb. 18, 1922, Ch. 58, Sec. 8, 42 Stat. 392):

“upon a decree being rendered ‘in any such case for an infringement the complainant shall be entitled to recover, in addition to the profits to be accounted for by the defendant, the damages the complainant has sustained thereby, and the court shall assess the same or cause the same to be assessed under its direction. If on the proofs it shall appear that the complainant has suffered damage from the infringement or that the defendant has realized profits therefrom to which the complainant is justly entitled, but that such damages or profits are not susceptible of calculation and determination with reasonable certainty, the court may, on evidence tending to establish the same, in its discretion, receive opinion or expert testimony, which is hereby declared to be competent and admissible, subject to the general rules of evidence applicable to this character of testimony; and upon such evidence and all other evidence in the record the court may adjudge and decree the payment by the defendant to the complainant of a reasonable sum as profits or general damages for the infringement.”

(P. 9) *Widenski v. Shapiro, Bernstein & Co., Inc.*, 147 Fed. (2d) 909, 911:

“It is indicated in the case last cited and established in *Enterprise Mfg. Co. v. Shakespeare Co.*, 6 Cir., 141 F. 2d 916, 919, and the cases cited therein, that proof of either established or reasonable royal-

ties may be resorted to in patent cases only when the patentee is unable to make satisfactory proof of his actual damage and the actual profits of the infringer. That is to say, a plaintiff in a patent case, if he prevails on the issue of infringement, may recover upon the basis of an established or reasonable royalty only after he has failed to prove satisfactorily his own loss and the infringer's profits. Thus the royalty rule provides successful plaintiffs in patent suits who have been harmed but cannot prove either their actual damages or the defendant's actual profits with a means to escape the hollow victory of an award of purely nominal damages. But the Copyright Act itself makes provision for similarly situated plaintiffs in copyright cases in the 'in lieu' clause of § 25(b), a provision not found in the corresponding section of the Patent Law, (35 U. S. C. A. § 70), and from this we conclude that it is a substitute for the established or reasonable royalty rule applied in patent cases."

(P. 11) *Krentler-Arnold Hinge Last Co. v. Leman*, 24 Fed. (2d) 423, 424, 425:

"The profits of the Krentler Company were proved. There were no facts from which damages could be proved, and the master resorted to the reasonable royalty rule. In this respect he was in error. The rule of law allowing damages to be assessed under the guise of a reasonable royalty arose in cases where the evidence showed that damage had been sustained, but there were no sufficient facts from which to ascertain actual damages.

The leading case on the subject is *United States Fruitmentum Co. v. Lauhoff*, 216 F. 610, in which Judge Denison in 1914 in a learned and able opinion delivered the decision of the Circuit Court of Appeals for the Sixth Circuit. The judge characterizes this kind of proof as the determination of 'general damages.' 216 F. at page 617.

The material part of the statute governing the case at bar (section 70 of title 35 of the U. S. Code [35 USCA § 70; Comp. St. § 9467]) is as follows:

(Quoting Statute)

* * * It will be noticed that in the last line of the excerpt above printed the words 'general damages' are used. This seems to indicate that the parliamentary draftsman had Judge Denison's opinion in mind.

By the terms of the statute general damages can be awarded only when neither profits nor damages can be proved."

Argument V

(P. 13) *Sheldon v. Metro-Goldwyn Corp.*, 309 U. S. 390, 400, 401 (60 Sup. Ct. 681, 84 Law Ed. 825):

"In passing the Copyright Act, the apparent intention of Congress was to assimilate the remedy with respect to the recovery of profits to that already recognized in patent cases. Not only is there no suggestion that Congress intended that the award of profits should be governed by a different principle in copyright cases but the contrary is clearly indicated by the committee reports on the bill. As to § 25 (b) the House Committee said:

'Section 25 deals with the matter of civil remedies for infringement of a copyright . . . The provision that the copyright proprietor may have such damages as well as the profits which the infringer shall have made is substantially the same provision found in section 4921 of the Revised Statutes relating to remedies for the infringement of patents. The courts have usually construed that to mean that the owner of the patent might have one or the other, whichever was the greater. As such a provision was found both in the trade-mark and patent laws, the committee felt that it might be properly included in the copyright laws.' "

(P. 14) *Riverside Heights Orange Growers' Ass'n. v. Stebler*, 240 Fed. 703, 715:

"Mr. Justice Matthews, delivering the opinion in *Root v. Railway Company*, 105 U. S. 189, 213, 26 L. Ed. 975, and referring to this section of the Revised Statutes, states that:

'Under the act of Congress of 1870, he [the patentee] may recover damages in addition to the profits to be accounted for by the defendant; but, as the re-

covery is limited by the act to the *actual* damages, it is manifest that the recovery of damages and profits is not intended to be *double*, but that, when necessary, the damages are to supplement that loss of the complainant which the profits found to have been received are insufficient to compensate, subject to the power of the court as to their increase, as in case of verdicts.'

That the additional damages are to compensate patentee only for such loss as he may have sustained in excess of the infringer's gains and profits is stated in clear and unambiguous terms in the opinion in *Tilghman v. Proctor*, 125 U. S. 136, 149, 8 Sup. Ct. 894, 901 (31 L. Ed. 664), * * *

* * *

The foregoing requires a decree in favor of plaintiff for such sum as will fully compensate him for all losses occasioned by defendants' infringement (such losses exceeding the amount of defendants' profits).''

Argument VI

(P. 16) *Stonesifer v. Twentieth Century-Fox Film Corporation*, 140 Fed. (2d) 579, 583, 584:

"The record reveals that considerable trial time in the court below was consumed in the determination of the film's approximate total cost. It appears that this, including costs of production, prints and distribution, amounted to \$842,400, and that the film rentals amounted to \$862,200, or a net profit of \$19,800. From this the trial court assessed damages for the infringement of \$3,960, or one-fifth of the net profits.

It is now settled that where a portion of the profits of an infringing work is attributable to the appropriated work, to avoid an unjust course by giving the originator all profits where the infringer's labor and artistry have also to an extent contributed to the ultimate result, there may be a reasonable approximation and apportionment by the court of the profits derived therefrom. *Sheldon et al. v. Metro-Goldwyn Pictures Corporation et al.*, 2 Cir., 106 F. 2d 45, affirmed 309 U. S. 390, 60 S. Ct. 681, 84 L. Ed. 825. See, also *Sammons, et al. v. Colonial Press, Inc., et al.*, 1 Cir., 126 F. 2d 341. We find no reason to disturb the award of damages."

No. 11286

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

UNIVERSAL PICTURES COMPANY, INC., a Delaware Corporation, and CLYDE BRUCKMAN,

Appellants,

vs.

HAROLD LLOYD CORPORATION, a California corporation,

Appellee.

HAROLD LLOYD CORPORATION, a California corporation,

Appellant,

vs.

UNIVERSAL PICTURES COMPANY, INC., a Delaware Corporation, and CLYDE BRUCKMAN,

Appellees.

Appellant Bruckman's Reply to Opening Brief for
Cross-Appellant Harold Lloyd Corporation Upon
Its Cross-Appeal.

FILED

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Appellant Bruckman's Reply to Opening Brief for Cross-Appellant Harold Lloyd Corporation Upon Its Cross-Appeal.

Statement.

Appellee and cross-appellant for convenience will be referred to as "plaintiff". Appellants and cross-appellees for convenience will be referred to as "defendants" or

“defendant Universal” or “defendant Bruckman”, whichever may be appropriate.

Plaintiff in its opening brief upon its cross-appeal ignores settled principles of law on appeal, asks this Court to exceed its powers, and misinterprets well-settled rules of law or misapplies them.

Plaintiff first asks this Court to award general damages and to increase the special damages awarded by the trial court. By this novel request plaintiff suggests that this Court overthrow the findings of the trial court, which are based upon conflicting evidence, weigh the evidence, resolve the conflict, make new findings, and order a new and different judgment based thereon. (Op. Br. pp. 15-31.) Plaintiff cites no authorities to support its position, for the obvious reason that the authorities on the point are against plaintiff.

Secondly, plaintiff contends that the trial court erred in apportioning defendant Universal’s profit to those attributable to the alleged infringing comedy sequence, and in failing to award plaintiff all of the profits in addition to awarding damages. To support this proposition plaintiff takes the position that a copyright infringer must respond in damages and account for profits. Plaintiff ignores controlling authorities, which hold that neither of plaintiff’s contentions is maintainable.

Thirdly, plaintiff claims that it is entitled to statutory damages under the “in lieu” provision of Section 25(b) of the Copyright Act. Inasmuch as defendant Universal’s profits were proved with certainty, and evidence was received on the issue of damages and the court awarded damages which exceeded defendant Universal’s profits,

plaintiff's position under this point likewise flies in the face of controlling authorities. Besides, plaintiff cites no applicable authorities to support its claim.

Finally, plaintiff complains that the trial court sustained defendants' objections to its offer of proof.

The oral offer was too indefinite to rule upon. [Tr. Vol. II, pp. 367-368.] A written offer was filed after the trial court had lost jurisdiction of the case. It was filed after all parties had filed their notices of appeal. Leave to file the written offer was given on November 16, 1945, but it was not filed until March 7, 1946. Moreover, the evidence offered was cumulative besides being immaterial.

I.

Plaintiff's Position That This Court Should Assess General Damages De Novo and Reassess Special Damages Is Not Maintainable. Besides, the Trial Court Erred in Assessing Any Damages.

(a) In our brief on Bruckman's appeal we have shown that the trial court erred in assessing any damages at all. (Appellant Bruckman's Op. Br. pp. 28-34, 63-69. See, also, Op. Br. for Appellant Universal Pictures Company, Inc. pp. 53-68.)

In particular, we have shown that the trial court erred in assessing damages for the reason that the trial court refused to accept, in fact disregarded, the testimony of both plaintiff's and defendants' expert witnesses and made an arbitrary finding assessing damages at \$40,000, which finding was based upon mere conjecture and unsupported by any substantial evidence. (Bruckman's Op. Br. p. 63.)

While it is true that the trial court may reject opinion evidence (*The S. C. L. No. 9*, 3 Cir. (1940), 114 F. (2d) 964, 968, it may not reject such evidence and then make an arbitrary finding of value based upon mere conjecture unsupported by any substantial evidence.

Emerald Oil Co. v. Commissioner of Internal Revenue, 10 Cir. (1934), 72 F. (2d) 681, 683;

Phipps v. Commissioner of Internal Revenue, 10 Cir. (1942), 127 F. (2d) 214, 217;

Diamond Alkali Co. v. Heiner, 3 Cir. (1932), 60 F. (2d) 505, 510.

(b) Plaintiff contends that this Court should assess general damages *de novo*. (Op. Br. pp. 15-19.) Plaintiff cites no authorities to support this strange and novel contention.

Assuming that the evidence was sufficient to support any finding of damages at all, it was conflicting, the credibility of the witnesses and the weight of the testimony were for the trial court, and it is submitted that this Court should not overthrow those findings, test the credibility of the witnesses, weigh the evidence, overthrow the findings of the trial court, and order the entry of a new and different judgment. To do so would be to fly in the face of such authorities as *United States v. State Street Trust Co.*, 1 Cir. (1942), 124 F. (2d) 948, 950-951; *Rothman v. Wilson*, 9 Cir. (1941), 121 F. (2d) 1000; and *Anglo California National Bank v. Lazard*, 9 Cir. (1939), 106 F. (2d) 693.

Besides, the issue of general damages was not presented to, or considered or passed upon by, the trial court, and the point therefore should not be considered by this Court.

Goldie v. Cox, 8 Cir. (1942), 130 F. (2d) 690, 715.

Plaintiff at the commencement of the trial announced, in answer to an inquiry by the court, that its proof on the issue of damages would be directed to the destruction of the value of the remake and reissue rights of plaintiff's motion picture "Movie Crazy". [Tr. Vol. I, p. 71.] Plaintiff was given full opportunity to present evidence on the issue of damages. As a matter of fact, the court continued the trial of the case from September 13, 1945, to November 16, 1945, to give the parties the right to produce more satisfactory proof on the issue of damages. [Tr. Vol. II, pp. 344-45.] Plaintiff took advantage of this opportunity, and called A. M. Botsford [Tr. Vol. II, pp. 453-470], and recalled Arthur M. Landeau [Tr. Vol. II, p. 400]. Plaintiff had its day in court on the issue of damages. Having failed to produce evidence sufficient to support a finding on damages, it should not now be permitted to further contest that question, or be given further opportunity to piece out defective proofs. That question should be considered closed. But if there be a reversal of the case, assuming that this Court holds there is liability, it is submitted that the most this Court should do is to direct the trial court to enter judgment for plaintiff against defendant Universal alone limited to the sum of \$4,000.00, which represents 20% of the profits of defendant Universal.

Washingtonian Pub. Co., Inc. v. Pearson, C. A. Dist. Col. (1944), 140 F. (2d) 465, 467.

(c) Plaintiff next contends that this Court should re-examine the testimony of the experts on special damages called by both plaintiff and defendants, weigh their testimony, pass upon their credibility, overthrow the finding of the trial court, and then make a new finding reassessing damages and order the trial court to enter a new and different judgment based upon this Court's finding. (Op. Br. pp. 19-31.)

Again plaintiff cites no authority.

The controlling authorities on the question hold that plaintiff's position is not maintainable.

The rule is well settled that an appellate court will not disturb the findings of a trial court where the findings are based upon conflicting evidence.

United States v. State Street Trust Co., 1st Cir. (1942), 124 F. (2d) 948, 950-951.

In *The Bergen*, 9th Cir. (1933), 64 F. (2d) 877, this Court said:

“* * * In any event, the conclusion to be drawn from the evidence on the question of notice was primarily for the trial judge, and, in view of the conflicting testimony, we are not at liberty to disturb his finding. As said by this court in *The Mabel*, 61 F. (2d) 537, 540: ‘Even if we were inclined to differ with the learned trial judge who saw the witnesses, heard their testimony, and had opportunity of passing upon their credibility and accuracy, we would not be warranted in interfering with his findings of fact and conclusions, “unless the record discloses some plain error of fact, or unless there is a misapplication of some rule of law”’ [citing cases]. No such error or misapplication appears in the record.” (P. 880.)

In *Muentzer v. Los Angeles Trust & Savings Bank*, 7th Cir. (1924), 3 F. (2d) 222, the Court announced the rule as follows:

“While an examination of the record is necessary to determine whether the same is barren of all proof showing or tending to show liability on the part of defendants, we are not called upon to weigh conflicting evidence, nor substitute our conclusion for that of the trial judge.

“The foregoing evidence justified the court in finding a ratification of Jenkins’ action and we cannot disturb it.” (P. 225.)

In *Dempsey v. Merritt, Chapman & Scott Corporation*, 2d Cir. (1926), 10 F. (2d) 687, the Court had this to say:

“It is quite true that he says that in this instance he did consult the bargee and took his direction. Whether he should be believed, or the bargee, who contradicted him, we do not know; it is quite enough that Judge Campbell, who saw them both, chose to believe the bargee. We have said over and over that we will not re-examine such a finding.” (P. 688.)

(d) Plaintiff next asserts: “C. The Prejudicial Attitude of the Trial Court Towards the Amount of Damages Sustained by Plaintiff.” We are at a loss to understand what plaintiff means by this charge when read in the light of what plaintiff says in its brief under this heading, as follows:

“Despite an honest, conscientious and intelligent approach to the problem of liability, from the commencement of the trial the District Judge manifested an inclination to discount and minimize any evidence

of moving picture production or distribution figures or which related to values or profits in the motion picture industry.” (Op. Br. p. 29.)

“By quoting from the record—and the foregoing examples might be multiplied—we do not mean to charge the trial court with being arbitrary, capricious, or unreasonable. We feel that Judge Harrison attempted to reach what in his opinion was an honest and fair judgment.” (Op. Br. pp. 30-31.)

The point, whatever it is, is not available to plaintiff because it was not made in either its Statement of Points on Appeal [Tr. Vol. II, pp. 542-543] or in its Specifications of Error. (Op. Br. pp. 5-6.)

C. C. A. 9, Rule 20.

Besides, the point ignores first principles.

Obviously the findings of the trial court cannot be overthrown.

As this Court said in *Stoody Co. v. Mills Alloys*, 9th Cir. (1933), 67 F. (2d) 807, 809:

“In this connection, we may observe that error is not assignable to the opinion of a court.”

* * * * *

“* * * These headings are practically new assignments of error, and are based upon what the trial court said in delivering its oral opinion. The opinion of the court was not the subject of exception or assignment of error. The reasons given in the opinion for the judgment of the court might be wrong, and still its judgment right. *It is what the court did, and not what it said, which is subject to exception and review.*”

II.

The Trial Court Had the Right to Apportion Profits, and Did Not Err in Refusing to Award Any Profits to Plaintiff.

(a) The profits which defendant Universal made from the production and exhibition of its motion picture "So's Your Uncle" were proved with certainty. For that matter, the amount of the profits were arrived at by a stipulation between plaintiff and defendants. [Tr. Vol. II, pp. 474-475.]

The trial court found that defendant Universal had benefited by the alleged infringement to the extent of twenty per cent, and no more, of the profits, namely, the sum of \$4,100.00. [Tr. Vol. I, p. 36.] Plaintiff contends that there was no evidence upon which an apportionment of profits could be made. Plaintiff in making this contention ignores *Sheldon v. Metro-Goldwyn Pictures Corporation* (1940), 309 U. S. 390, 84 L. Ed. 825, and *Twentieth Century-Fox Film Corporation v. Stonesifer*, 9th Cir. (1944), 140 F. (2d) 579.

The trial court viewed plaintiff's motion picture "Movie Crazy," as well as defendant Universal's motion picture "So's Your Uncle." It could determine to what extent the comedy sequence contributed to the success of defendant Universal's said motion picture, what part the talents of the actors, the direction, the story, the scenery, the artistic conceptions, and the expert supervision contributed by defendants played in the creation of the profits.

This Court in *Twentieth Century-Fox Film Corporation v. Stonesifer*, *supra*, followed the *Sheldon* case, *supra*, and in affirming the trial court in the apportionment of profits in the *Stonesifer* case said:

“It is now settled that where a portion of the profits of an infringing work is attributable to the appropriated work, to avoid an unjust course by giving the originator all profits where the infringer’s labor and artistry have also to an extent contributed to the ultimate result, there may be a reasonable approximation and apportionment by the court of the profits derived therefrom.” (140 F. (2d) at 584.)

At most, assuming our interpretation of *Sheldon v. Metro-Goldwyn Pictures Corporation*, *supra*, and *Twentieth Century-Fox Film Corporation v. Stonesifer*, *supra*, is not correct, this Court should refer the case to the trial court for the sole purpose of apportioning the profits.

(b) Plaintiff next contends that it is entitled to profits and damages. Plaintiff again ignores controlling authorities.

Sheldon v. Metro-Goldwyn Pictures Corporation, *supra*, holds that where profits are proved with certainty plaintiff is entitled to either profits or damages, whichever are the greater, but not to both profits and damages.

In *Sheldon v. Metro-Goldwyn Pictures Corporation*, *supra*, the Supreme Court, in dealing with the question, said:

“In passing the Copyright Act, the apparent intention of Congress was to assimilate the remedy with respect to the recovery of profits to that already recognized in patent cases. Not only is there no suggestion that Congress intended that the award of

profits should be governed by a different principle in copyright cases but the contrary is clearly indicated by the committee reports on the bill. As to §25(b) the House Committee said:

“ ‘Section 25 deals with the matter of civil remedies for infringement of a copyright. . . . The provision that the copyright proprietor may have such damages as well as the profits which the infringer shall have made is substantially the same provision found in §4921 of the Revised Statutes relating to remedies for the infringement of patents. The courts have usually construed that to mean that the owner of the patent might have one or the other, whichever was the greater.’ ” (309 U. S. 400, 81 L. Ed. 831.)

It is well settled that when the Supreme Court construes a statute, the construction placed by it upon the statute becomes an integral part of the statute.

The Supreme Court in *Gulf, Colorado and Santa Fe Railway Company v. Moser* (1927), 275 U. S. 133, 72 L. Ed. 200, said:

“The interpretation approved by us has become an integral part of the statute. It should be accepted and followed.” (275 U. S. 136, 72 L. Ed. 202.)

In *Jerome v. Twentieth Century-Fox Film Corporation* (D. C., S. D., N. Y., 1944), 58 Fed. Supp. 13, 15, it was held that a plaintiff in a copyright case was not entitled to both profits and damages.

The authorities cited by plaintiff in support of its contention all antedate the *Sheldon* case, *supra*.

III.

Profits Having Been Proved, Plaintiff Is Not Entitled to Statutory Damages.

(a) Plaintiff contends that it is entitled to statutory damages under the "in lieu" provision of Section 25 of the Copyright Act. Again, plaintiff ignores controlling authorities.

In *Sheldon v. Metro-Goldwyn Pictures Corporation*, *supra*, the Supreme Court said:

"We agree with petitioners that the 'in lieu' clause is not applicable here, as the profits have been proved and the only question is as to their apportionment." (309 U. S. at 399, 84 L. Ed. at 830.)

The Circuit Court of Appeals for the First Circuit in *Sammons v. Colonial Press*, 1st Cir. (1942), 126 F. (2d) 341, 350, followed the *Sheldon* case, *supra*, and said:

"However, if the district court finds after further hearing upon remand that Colonial Press made profits for which it must account, the amount of such profits will be the measure of recovery, and it will no longer be permissible to decree statutory damages 'in lieu of actual damages and profits.' "

The Court of Appeals for the District of Columbia in *Washingtonian Pub. Co. v. Pearson* (1944), 140 F. (2d) 465, following the *Sheldon* case, *supra*, in speaking of the "in lieu" provision of Section 25 of the Copyright Act, said:

"It is not applicable here, first because there was no 'injury done' to appellant, and second because 'the profits have been proved.' " (P. 466.)

See, also:

Davilla v. Brunswick-Balke-Collender Co. of New York, 2d Cir. (1938), 94 F. (2d) 567.

IV.

The Trial Court Did Not Err in Sustaining Defendants' Objections to Plaintiff's Offer of Proof.

Plaintiff complains that the trial court erred in sustaining defendants' objections to its written offer of proof. It makes the point in its Specifications of Error relied upon (Op. Br. pp. 6-13), but does not argue the point and cites no authorities in support of the specification. Because no authorities are cited in support of the specification, and because the specification was not argued by plaintiff, this Court should ignore the specification. (C. C. A. 9, Rule 20.)

Besides, the point is not available to plaintiff because its offer of proof was filed too late.

On November 16, 1945, during the trial of the case, plaintiff's counsel was given permission to file a written offer of proof. [Tr. Vol. II, p. 466.]

On November 16, 1945, all parties rested, and the case was adjourned to December 17, 1945, for oral argument. [Tr. Vol. II, p. 490.] Up to that time plaintiff had not submitted its written offer of proof.

On December 17, 1945, the following occurred:

"Mr. Fendler: I shall be very glad to restrict myself to matters which are not covered in my briefs. I shall not cite any additional authorities but I do wish to call a few matters to your Honor's attention. Also I think there is an offer of proof which your Honor directed be filed in writing.

"The Court: That will be deemed filed. For the reasons heretofore stated, the evidence has been rejected." [Tr. Vol. II, p. 492.]

Conclusion.

Plaintiff's cross-appeal should be dismissed, and all relief asked for in its brief should be denied, for the reasons herein given.

Respectfully submitted,

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No. 11286.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

UNIVERSAL PICTURES COMPANY, INC., a Delaware Corporation, and CLYDE BRUCKMAN,

Appellants,

vs.

HAROLD LLOYD CORPORATION, a California corporation,

Appellee.

HAROLD LLOYD CORPORATION, a California corporation,

Appellant,

vs.

UNIVERSAL PICTURES COMPANY, INC., a Delaware Corporation, and CLYDE BRUCKMAN,

Appellees.

BRIEF FOR APPELLEE, HAROLD LLOYD CORPORATION.

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Appellees.

BRIEF FOR APPELLEE, HAROLD LLOYD CORPORATION.

Preliminary Comment Upon Brief Filed by Appellant Universal.

Reluctantly we feel compelled to advise this Court that the Opening Brief filed by appellant Universal Pictures is so misleading in its statement of the evidence that sub-

stantially no reliance may be placed thereon. Equally misleading are its legal arguments on the issues of liability and damages because they assume a factual situation contrary to the actual evidence in the case and to the findings of fact made by the Trial Court.

On the first page of its brief appellant Universal states that the defendant's appeal is "from a judgment . . . holding that plaintiff's copyright . . . has been *infringed by the use of six gags or pieces of stage business used in a comedy routine in the motion picture of defendant Universal.*" (App. Op. Br. p. 1.) No such phraseology appears in the findings or judgment of the Trial Court. In fact, defendants have appealed from a judgment holding plaintiff's copyright to have been infringed by defendant's acts in copying "57 consecutive scenes" from plaintiff's picture. [Tr. p. 42.] Furthermore, the Trial Court expressly found that "the characters, characterization, motivation, treatment, action and sequence of action" appearing in such sequence of 57 consecutive scenes was "*knowingly, wilfully and deliberately copied, misappropriated and plagiarized by defendants, and each of them, from the last 300 feet of Reel 7 and the first 700 feet of Reel 8 of plaintiff's copyrighted motion picture photoplay entitled 'MOVIE CRAZY.'*" [Tr. p. 34.]

A bare reading of the findings and judgment of the Trial Court thus discloses the "holding" of the judgment to be far different from that stated by counsel for appellant Universal.

Another illustrative distortion occurs in Universal's repeated statements that the Trial Court *erroneously* found as a fact "that the exhibition of defendant's picture continued after notice of plaintiff's alleged claim" (App. Uni-

versal's Op. Br. pp. 38, 71),* and the inference that appellant Universal had no knowledge whatever that it was infringing plaintiff's rights until fifteen months after it had produced, distributed and released its infringing picture. (App. Universal's Op. Br. p. 72.) Appellant Universal even goes so far as to claim (contrary to the only evidence in the case) "that plaintiff had *deliberately* failed to notify defendants of the alleged infringement until over fifteen months after the general release of defendant's picture." (App.Op. Br. p. 7.)

The truth is that plaintiff did give a written notice to Universal [Defendant's Ex. G; Tr. pp. 386-387] in March, 1945, concerning a whole series of copyright infringements by several different Universal pictures, of which "So's YOUR UNCLE" was only one of many; and the evidence is uncontradicted that this notice was given "not very long" after the matter was first called to Lloyd's attention. [Tr. p. 153.] There was no evidence that any one in the Lloyd organization had ever heard of any infringements by any Universal picture prior to March, 1945, and shortly before Lloyd's counsel notified Universal to cease and desist from distribution of all infringing pictures.

*Defendant Universal's answer supports the finding of the Trial Court for it contains the following express admission:

"this answering defendant admits that on or about the 20th day of March, 1945, plaintiff gave this defendant a notice in writing, demanding that said defendant cease and desist from further distribution, exhibition or release of said defendant's motion picture photoplay entitled 'So's YOUR UNCLE.' and admits that said defendant has continued with the distribution and exhibition of said motion picture photoplay." [Tr. p. 20.]

Defendant Universal verified this answer June 2, 1945. [Tr. p. 21.]

However, the finding of the Trial Court [Finding VIII, Tr. p. 35], that during the years 1943, 1944 and 1945 defendants "at all times were fully informed and had full knowledge that they were infringing upon plaintiff's copyright" did not rest (as appellant Universal implies) upon the *written* notice received in evidence as Defendant's Exhibit G, but upon the uncontradicted evidence of the defendant Bruckman that the time he wrote the sequence in defendant Universal's picture "So's YOUR UNCLE" he deliberately "patterned" the same upon the identical sequence in plaintiff's motion picture "MOVIE CRAZY"; and that *he had so informed Universal's producer, Jean Yarbrough*. [Tr. p. 95.]

Predicated upon this admission by the defendant Bruckman, and upon abundant additional evidence (both "internal" and otherwise), the Trial Court made the following finding of fact [Tr. p. 34]:

"That during the year 1943 the individual defendant Clyde Bruckman was employed by the defendant Universal Pictures Co. Inc. in the capacity of writer and to assist in the writing of a certain motion picture photoplay entitled 'So's YOUR UNCLE' which photoplay was then in the course of preparation and production by the defendant Universal Pictures Co. Inc. That the individual producer placed in charge of said motion picture production by said defendant corporation was one Jean Yarbrough and at all times hereinafter mentioned said defendants Yarbrough and Bruckman and said defendant Universal Pictures Co. Inc. were *fully informed* and had *full knowledge* that that certain sequence of fifty or more consecutive scenes constituting the so-called 'magician's coat sequence' hereinafter more specifically de-

scribed, was copied and misappropriated by defendants and each of them in said motion picture photoplay entitled 'So's YOUR UNCLE' from plaintiff's motion picture photoplay entitled 'MOVIE CRAZY.' That said sequence consists of the last three hundred feet of reel seven and the first seven hundred feet of reel eight of 'MOVIE CRAZY' and the counterpart of said scenes and sequence consist of the first fifty-seven scenes and first six hundred feet of the fourth reel of defendant's motion picture photoplay entitled 'So's YOUR UNCLE.' That the characters, characterization, motivation, treatment, action and sequence of action, appearing in said portion of said fourth reel of defendant's said motion picture photoplay entitled 'So's YOUR UNCLE' were *knowingly, wilfully and deliberately copied*, misappropriated and plagiarized by defendants and each of them from said portion of the seventh and eighth reels of plaintiff's said motion picture photoplay entitled 'MOVIE CRAZY.'" [Finding VII, Tr. p. 34.]

Defendant Universal does not dare to contend openly that this finding of *knowing, wilful and deliberate* copying is unsupported by the evidence. Yet by *ignoring* both finding of fact VII and the evidence supporting it and by referring only to the written notice given by the plaintiff after it discovered defendants' infringements, defendants infer that Finding VIII of continued distribution and exhibition "with notice and knowledge of plaintiff's rights in the premises" was *wholly predicated* upon the written notice of March 20th and was not in any respect based upon the admissions in defendants' answer [Tr. p. 20], or the deliberate copying blandly confessed by the defendant Bruckman and concurred in by Universal's pro-

ducer Jean Yarbrough who was placed in charge of the infringing production by Universal.

Appellant Universal Pictures Company, Inc., is peculiarly chargeable with knowledge and notice of the matters specifically entrusted to their agent and producer Jean Yarbrough and to their agent and employee Clyde Bruckman; both of whom were acting within the course and scope of their specific agency and employment in wilfully incorporating into Universal's motion picture material which they knew was "suggested by and patterned after" the Harold Lloyd motion picture "Movie Crazy." The rule is well settled that a corporation is chargeable with knowledge and notice of matters becoming known to its agents and employees within the course and scope of their agency and employment (*Fletcher Cyclopaedia of the Law of Private Corporations*, Vol. 4, Chap. 42, Par. 2215, page 3430, citing *Simmons Creek Coal v. Doran*, 142 U. S. 417, 35 L. Ed. 1063; *Duncan v. Jauden*, 15 Wall. 165, 21 L. Ed. 142, and innumerable decisions in state and Federal courts throughout the country).

See also:

Curtis Co. v. U. S., 262 U. S. 215, 222, 43 S. Ct. 570, 67 L. Ed. 956;

Schneider v. Thompson, 58 F. (2d) 94, 96;

Shapiro v. Bernstein Co. v. Belten, 47 Fed. Supp. 648.

Appellant Universal's legal argument that plaintiff's damages should be limited to \$5,000 because defendant "established that it was not aware that it was infringing and that such infringement could not have been reasonably foreseen" (Br. p. 66) deliberately disregards all evidence

of wilful copying by its writer and producer as well as the findings of fact made by the Trial Court that the piracy was *not* accidental but was knowing, wilful and deliberate.* Furthermore, the Trial Court expressly found to the contrary [Finding VIII, Tr. p. 35]:

“ . . . that defendants and each of them at all times were fully informed and had full knowledge that they were infringing upon plaintiff’s copyright and the court further finds that the defendant Universal Pictures Company Inc. could and should have reasonably foreseen said infringements upon plaintiff’s copyright.”

In view of this finding and of the uncontradicted evidence of the defendants that at all times during the production of the infringing motion picture Universal’s writer Bruckman and Universal’s producer Yarbrough fully recognized that the infringing sequence was “suggested by and patterned after” the Harold Lloyd picture “MOVIE CRAZY” [Tr. pp. 95-96], it is obvious that appellant Universal cannot support its claim that it “*estab-*

*Defendant’s argument is particularly inapplicable for still another reason: In no event does the \$5,000 limitation apply to *actual* damages. The limitation is solely upon *statutory* damages where the infringer establishes his innocence, his ignorance, and his inability to reasonably foresee infringements.

The statute expressly provides that the limitation upon recovery of statutory damages is one of the “exceptions” which “shall not deprive the copyright proprietor of any other remedy given him under this law” (*e. g.*, actual damages).

Amdur states in his treatise on “*Copyright Law and Practice*” at p. 1155:

“In awarding *actual* damages and profits the court is not restricted by the maximum limitation, *this applying only to statutory damages.*”

lished that it was not aware it was infringing and that such infringement could not have been reasonably foreseen.” (Br. p. 66.)

Appellant Universal’s so-called “Statement of the Case” (Br. pp. 31-39) is equally without merit. It does not fairly state the facts nor “succinctly” present the questions involved upon this appeal. Since the Rules of this Court require us to indicate whether or not we agree with this Statement, we desire to state that we do not concur in any of the statements or conclusions contained therein and we respectfully refer the Court to the entire record.

For example, the first words in appellant Universal’s “Statement of the Case” are: “*Plaintiff’s* witness Hirli-
man testified,” etc. (Br. p. 31.) Hirli-
man was *not* plaintiff’s witness but was called and testified solely on behalf of the defendants. [See Tr. p. 420.]

Appellant’s discussion of Hirli-
man’s testimony is equally misleading because the pages of the transcript referred to do *not* contain any of the language attributed by Universal’s counsel to the witness, *e. g.*, “gags,” “stage business,” “comedy routine,” “comedy accretion,” etc. [See Tr. pp. 447-448.] These terms are supplied solely by appellant’s counsel.

Similarly misleading is the statement that the Trial Court “recognized that as this sequence was not a part of the general theme, it could be deleted without affecting the picture.” (Br. p. 33.) The Trial Court did *not* so state and its oral opinion [Tr. p. 520] and findings of fact [Tr. p. 34] are to the contrary.

Under sub-heading (b) (Br. p. 33) defendant’s counsel again injects the words “gags,” “stage business,” and “comedy routine,” into what purports to be Lloyd’s testi-

mony, stating that Lloyd “conceded” that the 57 consecutive scenes slavishly copied by defendants was a “sequence of gags,” and that the court acquiesced in the contention that the “sequence of these ‘gags’ or ‘stage business’ was the subject of copyright protection.” (Br. p. 33.) Lloyd did *not* so concede nor was the opinion, findings or judgment of the Court restricted in the manner stated by Universal’s counsel. Lloyd did testify that there were “gags *within* the comedy scene” but expressly stated that it was the “*succession of comedy scenes* which make up the whole sequence.” [Tr. p. 137.]

If (a) and (b) are intended to present a “question involved” as to copyright protection afforded a major sequence in a motion picture photoplay, see our Point II, *post*, pp. 27-33, that an original combination of characters, scenes and incidents arranged in a new pattern and sequence, is protected and is both “material” and “substantial.” (Point II (A), *post*, p. 34.)

Under subdivision (c) (Br. p. 34) defendant Universal apparently objects to the Trial Court’s consistency in excluding defendant’s offered evidence as to the price paid for a “silent” motion picture “GIRL SHY” [Tr. p. 447], after the Court had sustained defendant’s objections to similar proof offered by plaintiff with respect to comparable “talking” motion pictures like “MOVIE CRAZY.” [Tr. pp. 107-109, 377-381.] Defendants make five consecutive completely erroneous statements on page 35 which we answer in our Appendix hereto. The only legal point appears to be defendant’s highly misleading argument that the Trial Court “assessed damages upon the erroneous theory . . . that it could add such arbitrary amount” of damages to defendant’s profits as it might deem proper

under the “in lieu of” provision of Section 25 of the Copyright Act. (Br. pp. 35-37.) The truth is that the Trial Court did *not* award “arbitrary damages under the ‘in lieu of’ provision of Section 25”; nor did it “add” arbitrary damages to defendants’ profits in reaching its final determination as to the amount of actual damages sustained. The Trial Court clearly stated that it was fixing *actual* damages suffered by the plaintiff and not “arbitrary damages” or “statutory damages”:

“It is my function to try to ascertain an amount that I believe is the *actual damage* suffered and in arriving at actual damages I base them upon what in my opinion is the lessened value of that copyright. In other words, I believe that in a case of this character the only way that actual damages could be established would be to determine the lessened value of the picture by reason of the infringement. There may be other ways, but that is the method that I have followed in this case. I find and fix the actual damages suffered by Mr. Lloyd is the sum of \$40,000.00.” [Tr. p. 522.]

Upon our cross-appeal we contended, and still contend, that the evidence supports a judgment for actual damages of at least \$250,000. (Op. Br. for cross-appellant Harold Lloyd Corporation pp. 15-24.) *A fortiori* if the evidence would sustain a judgment for \$250,000 actual damages, a judgment of \$40,000 is abundantly supported by the same evidence.

Under subdivision (d) (Br. p. 38) appellant Universal states the Trial Court “fixed” (viz., based) its judgment of \$40,000 damages “upon the erroneous finding” that Universal continued distribution of the picture “with notice and knowledge of plaintiff’s rights in the premises”

and would continue so to do “unless permanently restrained and enjoined from so doing.” (Universal Br. p. 38.) No statement could be farther from the truth. Plaintiff’s first cause of action was solely for damages although plaintiff alleged full notice and knowledge by the defendants “at all times.” [Tr. p. 5.] Since Universal’s writer Bruckman and producer Yarbrough were at all times fully informed that Universal’s sequence was “patterned” after the Harold Lloyd sequence in “MOVIE CRAZY” [Tr. pp. 95-96] the Trial Court’s finding is based upon uncontradicted evidence. Plaintiff’s second cause of action for an injunction did allege that “Defendants have continued to infringe upon plaintiff’s said copyright by continuing to release, distribute and exhibit said motion picture to the public and defendants threaten and intend to continue so to do.” [Tr. p. 6, par. II.] But in its answer, defendant Universal admitted receipt of plaintiff’s written notice dated March 20, 1945, and “*admits that said defendant has continued with the distribution and exhibition of said motion picture photoplay.*” [Tr. p. 20, Par. II.] Universal’s answer was verified June 2, 1945 [Tr. p. 21], so the finding of the Trial Court [Tr. p. 36, Par. II] is fully supported by the admission contained in Universal’s own answer.

It is furthermore untrue that plaintiff “stipulated that exhibition of defendant’s picture had been stopped upon the receipt of plaintiff’s notice of infringement.” (Universal Op. Br. p. 39.) The record shows a stipulation that Universal sent instructions to its exchanges to stop the exhibition but the exact date of such instructions was never given and plaintiff’s counsel expressly stated “I will not stipulate the instructions were complied with.” [Tr. p. 452.]

Furthermore, on September 13, 1946, *six months after the written notice*, Universal's counsel had stated in open court that the picture "*will be*" *withdrawn* [Tr. p. 345]; he later expressly stated he did not contend that plaintiff was not entitled to an injunction. [Tr. p. 452.]*

There is no basis whatever for appellant Universal's statement that "the Court fixed such damages in the sum of \$40,000 upon the erroneous finding" of continued exhibition and distribution of the picture. (Universal Br. p. 38.) The damages had already accrued and were wholly predicated upon infringements occurring prior to the institution of the lawsuit as alleged in the first cause of action of the complaint. [Tr. p. 5, Pars. X and XI.]

Under subdivision (e) appellant Universal implies that the total damages sustained by plaintiff from both *Columbia's* infringements and Universal's infringements aggregated \$40,000 and that the Court was in error in not specifying the amount of damage plaintiff sustained through Columbia's infringements. (Universal Br. p. 39.) The damage done by Columbia's infringements was not pleaded in mitigation and the amount of such damages was not an issue in this lawsuit.**

The Court gave defendants the benefit of every doubt, however, when it stated that the evidence offered by it respecting the Columbia short had "minimized the actual

*"Mr. Fendler: You do not contend the plaintiff is not entitled to an injunction, do you?

Mr. Abeles: No." [Tr. p. 452.]

**Harold Lloyd testified he never heard of the infringing Columbia short until "just a few days" before he testified on the trial of this action. [Tr. p. 151.] Defendant's witness Adler testified he had never seen the Columbia short and did not believe they played around Los Angeles. [Tr. p. 336.] The files of the U. S. Dis-

damage” sustained through defendant Universal’s infringements. [Tr. p. 521.] Defendants are hardly in a position to now complain that had it not been for Columbia’s infringements, the Court would unquestionably have found the damages sustained by plaintiff through Universal’s infringements to have been *much more* than \$40,000. The finding of the Trial Court is specific upon the point that \$40,000 was the amount of damages sustained by plaintiff “*by reason of said infringements by defendants and each of them.*” [Tr. p. 35, Par. IX. See also Finding X, Tr. p. 36, and Conclusion of Law III, Tr. p. 39; Judgment, Tr. pp. 42-43.]

Restatement of Case and Issues.

Because appellant Universal has failed to state the issues, and appellant Bruckman’s “Statement of the Case” is merely a highly colored argument, we desire to restate the major issues involved upon this appeal (excluding the issues raised by our cross-appeal):

They are as follows:

1. Is there any substantial evidence to support the findings of fact by the Trial Court that defendants deliberately misappropriated a major sequence from plaintiff’s photoplay and does such piracy constitute infringement of plaintiff’s copyright?
2. Is there any substantial evidence to sustain the findings of fact by the Trial Court that plaintiff sustained at least \$40,000 actual damages as a result of defendants’ infringements?

strict Court for the Southern District of California, Central Division, in action No. 5184-W, reflect the fact that the Harold Lloyd Corporation filed suit several months ago against Columbia Pictures Corporation and Clyde Bruckman for infringements by the Columbia “short.”

SUMMARY OF ARGUMENT.

Point I.

PLAINTIFF'S MOTION PICTURE "MOVIE CRAZY"
IS A "DRAMATIC WORK" PROTECTIBLE UNDER
SUB. (d), SECTION 1, OF THE COPYRIGHT ACT.
Page 24.

Vitaphone Corp. v. Hutchinson, 19 Fed. Supp. 359;
18 *Corpus Juris Secundum* 233;

Tiffany Productions v. Dewing, 50 F. (2d) 911;
Kalem v. Harper Bros., 222 U. S. 55, 32 S. Ct.
55, 56 L. Ed. 92;

Patterson v. Century Productions, Inc., 19 Fed.
Supp. 30, affirmed 93 F. (2d) 489; Cert. Den.
303 U. S. 655, 58 S. Ct. 759, 82 L. Ed. 1114.

Point II.

FIFTY-SEVEN CONSECUTIVE COMEDY SCENES CON-
STITUTING ONE THOUSAND CONSECUTIVE
FEET OF FILM AND 20% OF PLAINTIFF'S EN-
TIRE FEATURE LENGTH PHOTOPLAY IS PRO-
TECTIBLE UNDER THE COPYRIGHT LAWS BE-
CAUSE IT CONSTITUTES A NEW, NOVEL AND
ORIGINAL COMBINATION OF CHARACTERS,
SCENES AND INCIDENTS ARRANGED IN A NEW
PATTERN AND SEQUENCE. Page 27.

13 *Corpus Juris* 1146;

Vitaphone Corp. v. Hutchinson, 19 Fed. Supp. 359,
at 360;

Patterson v. Century Productions, Inc., 19 Fed.
Supp. 872;

Detective Comics, Inc. v. Bruns Publications, Inc.,
111 F. (2d) 432 (C. C. A. 2);

Fleischer Studios, Inc. v. Freundlich, Inc., 5 Fed. Supp. 808 (affirmed 73 F. (2d) 276 (2d C. C. A.)); (Cert. Den. 294 U. S. 717, 55 S. Ct. 516, 79 L. Ed. 1250);

Sheldon v. Metro-Goldwyn-Mayer Pictures Corp., 81 F. (2d) 49, 54;

Italian Book Co. v. Rossi, 27 F. (2d) 1014;

National Institute v. Nutt, 28 F. (2d) 132, 134 (affirmed 31 F. (2d) 236);

Edwards & Deutsch v. Boorman, 15 F. (2d) 35;

Dymow v. Bolton, 11 F. (2d) 690, 692;

Corelli v. Gray, 30 L. T. Rep. 116.

- (A) Misappropriation of a Major Sequence in a Feature Length Motion Picture Constitutes Infringement of a "Material Portion" and a "Substantial Part" of Plaintiff's Copyrighted Work. The Whole Need Not be Taken in Order to Constitute Piracy. Page 34.

National Institute v. Nutt, 28 F. (2d) 132, at 135;
Ansehl v. Puritan Pharmaceutical Co. (8th C. C. A.), 61 F. (2d) 131; (Cert. Den. 287 U. S. 666, 53 S. Ct. 224, 77 L. Ed. 374;

Boosey v. Empire Music Co., Inc., 224 Fed. Rep. 646;

Chicago Record-Herald Co. v. Tribune Assn., 275 Fed. Rep. 979;

King Features Syndicate v. Fleischer (2d C. C. A.), 299 Fed. 533;

Hartfield v. Peterson (2d C. C. A.), 34 U. S. P. Q. 305, 91 F. (2d) 998;

Hill v. Whalen, 220 Fed. 359;

DeAcosta v. Brown (2d C. C. A.), 146 F. (2d) 408 (Cert. Den. 325 U. S. 862, 65 S. Ct. 1198, 89 L. Ed.);

Sheldon v. Metro-Goldwyn-Mayer (2d C. C. A.), 81 F. (2d) 49.

- (B) Purported Dissimilarities, Changes, Omissions, Additions, and Variations Made by Defendants Will Not Excuse, Exonerate, or Exculpate Deliberate Infringement. Page 36.

Boosey v. Empire Music Co., 224 Fed. 646, 647;
Nutt v. National Institute, 31 F. (2d) 236 (2d C. C. A.);

King Features Syndicate v. Fleischer, 299 Fed. 533 (2d C. C. A.);

Fleischer Studios Inc. v. Freundlich Inc., 73 F. (2d) 276;

Daly v. Palmer, 6 Fed. Cas. 3552;

Dam v. Kirk LaShelle, 166 Fed. 589 (affirmed 175 Fed. 902 (2d C. C. A.));

Maurel v. Smith, 220 Fed. 195;

Sheldon v. Metro-Goldwyn-Mayer, 81 F. (2d) 49;

Barsha v. Metro-Goldwyn-Mayer, 32 Cal. App. (2d) 556, 562.

- (C) Public Domain Is Not a Defense Where the Precise Combination and Arrangement of 57 Scenes in Consecutive Sequence Never Previously Existed in the Same Form and Combination as That Created and Devised by Plaintiff's Writers. In No Event Would Defendants Have Any Right to Copy Slavishly From Plaintiff's Work. Page 39.

Fisher v. Dillingham, 298 Fed. 145;

Detective Comics, Inc. v. Bruns Publications, Inc., 111 F. (2d) 432;

Stodart v. Mutual Film Corp., 249 Fed. 507 (Aff'd 249 Fed. 513);

Holmes v. Hearst, 174 U. S. 82, at p. 86, 19 S. Ct. 606, 43 L. Ed. 904;

Hartfield v. Peterson (2d C. C. 3), 34 U. S. P. Q. 305, 91 F. (2d) 998;

Sheldon v. Metro-Goldwyn Pictures Corp., 81 F. (2d) 49;

Harold Lloyd Corporation v. Witwer, 65 F. (2d) 1;

Italian Book Co. v. Rossi, 27 F. (2d) 1014;

National Institute v. Nutt, 28 F. (2d) 132, 134 affirmed 31 F. (2d) 236);

Holland v. Vivian Van Damm Productions, Ltd., MacGillivray's Copyright Cases 1936;

Graves v. Pocket Publications, Ltd., 54 T. L. R. 953, MacGillivray's Copyright Cases 1938.

(D) The Major Sequence Misappropriated by Defendants Does Not Consist Merely of Isolated "Gags" and Pieces of "Stage Business," Nor Mere "Comic Accretion." Defendants' Attempt to Brand or "Label" Plaintiff's Sequence Is Extremely Misleading. Page 44.

Falcon v. Famous Players Film Corp., 2 K. B. 474;

Harold Lloyd Corp. v. Witwer, 65 F. (2d) 1, 16;

Sheldon v. Metro-Goldwyn Pictures, 81 F. (2d) 49.

(E) A Major Sequence of 57 Consecutive Scenes Does Not Constitute a "Sub-section of Plot" or "Subordinate Sequence of Events" in the Sense Such Terms Have Been Used by the Courts to Describe General Theme or a Single Isolated Scene. Page 53.

Dymow v. Bolton, 11 F. (2d) 690, 692;

Harold Lloyd Corporation v. Witwer, 65 F. (2d) 1, 4, 10, 27, 28.

Point III.

WHERE PLAINTIFF PLEADS AND PROVES ACTUAL DAMAGES BY DELIBERATE WIDESPREAD INFRINGEMENTS, THE COURTS WILL NOT REQUIRE PRECISE MATHEMATICAL COMPUTATION BUT WILL AWARD A FAIR AND REASONABLE AMOUNT CONSISTENT WITH THE EVIDENCE BOTH EXPERT AND OTHERWISE. A DELIBERATE INFRINGER CANNOT RELY UPON UNCERTAINTY IN AMOUNT OF DAMAGES CAUSED BY HIS OWN WILFUL TORT. Page 58.

- (A) All of the Authorities Reflect the Well Established Rule That Mere Uncertainty as to the Amount and Extent of Damage Will Not Deprive the Plaintiff of Substantial Recovery. Page 61.

15 *Am. Jur.* (Damages), Sec. 23, p. 414; Sec. 28, pp. 493, 494;

Sinclair Refining Co. v. Jenkins Petroleum Process Co., 289 U. S. 689, 54 S. Ct. 736, 77 L. Ed. 1449;

Palmer v. Conn. Ry. Co., 311 U. S. 544, 61 S. Ct. 379, 85 L. Ed. 336;

Zinn v. Ex-Cell-O, 24 Cal. (2d) 297;

Paramount Productions v. Smith, 91 F. (2d) 863 (Cert. Den. 302 U. S. 749, 58 S. Ct. 266, 82 L. Ed. 579);

U. S. Frumentum Co. v. Lauhoff, 216 Fed. 610, 617;

President etc. v. Kelby, 147 F. (2d) 465, 476 (Cert. Den. 324 U. S. 866, 65 S. Ct. 916, 89 L. Ed.);

John B. Stetson Co. v. Stephen L. Stetson, 85 F. (2d) 586, 596 (Cert. Den. 299 U. S. 605, 57 S. Ct. 232, 81 L. Ed. 446];

Sheldon v. Metro-Goldwyn Pictures Corporation,
106 F. (2d) 45, 50;

*Gotham Silk Hosiery Company v. Artcraft Silk
Hosiery*, 147 F. (2d) 209;

American Law Institute Restatement of Torts,
Sec. 912, Comment D;

American Law Institute Restatement of Contracts,
Par. 33, Comment A;

Story Parchment Co. v. Patreson, 282 U. S. 555,
51 S. Ct. 248, 75 L. Ed. 544;

*Dowajiac Manufacturing Company v. Minnesota
Moline Plow Company*, 235 U. S. 641, 35 S.
Ct. 221, 59 L. Ed. 398.

(B) In Plagiarism Cases, as Well as All Other Cases In-
volving Personal Property, Courts Have Frequently
Awarded Damages Based on the Plaintiff's Own Testi-
mony of the Value of the Property Misappropriated.
Page 70.

Barsha v. Metro-Goldwyn-Mayer, 32 Cal. App.
(2d) 556;

Yadkoc v. Fields, 66 Cal. App. (2d) 150;

Paramore v. Mack Sennett, Inc., 9 F. (2d) 66;

Nathan v. King Features Syndicate, 32 N. Y. Supp.
(2d) 519;

Southern Express Co. v. Owens, 146 Ala. 412,
41 So. 752, 8 L. R. A. (N. S.) 369, 119 Am.
St. Rep. 41, 9 Ann. Cas. 1143;

Paramount Productions v. Smith, 91 F. (2d) 863,
866 (Cert. Den. 302 U. S. 749, 58 S. Ct. 266, 82
L. Ed. 579).

See also:

- Atlantic Monthly Company v. Post Publishing Company*, 27 F. (2d) 556;
Sacramento Sub. Fruit Lands Co. v. Soderman,
36 F. (2d) 934 (C. C. A. 9th);
22 Corpus Juris (Evidence), Sec. 863;
Union Pac. R. Co. v. Lucas, 136 Fed. 374;
Chicago etc. R. Co. v. Ohio City Lbr. Co., 214
Fed. 751;
Baltimore American Ins. Co. v. Pecos Merc. Co.,
122 F. (2d) 143;
Brookins v. Natl. Ref. Co., 26 Ohio App. 546, 26
Ohio App. 546, 160 N. E. 97;
White v. Jones, 79 App. Div. 373, 79 N. Y. Supp.
583;
Sturtevant v. Dowson, 110 Ore. 155, 222 Pac.
294.

(C) A Fortiori Is a Judgment for Damages Supported Where Not Only the Owner of the Property Misappropriated But Four Expert Witnesses Have Testified That Substantial Property Rights and Present Existing Intrinsic Property Values Have Been Impaired or Destroyed. Page 75.

- 20 *Am. Jur.* (Evidence), Sec. 890, pp. 747, 748;
McGowan v. American Pressed Tan Bark Co.,
121 U. S. 575, 7 S. Ct. 1315, 30 L. Ed. 1027;
General Paint Corp. v. Kramer, 68 F. (2d) 40
(Cert. Den. 292 U. S. 623, 54 S. Ct. 628, 78
L. Ed. 1478);
Standard Brands v. Federal Yeast Corp., 38 F.
(2d) 314;
Babcock v. Raymond, 2 Hilt. (N. Y.) 61;

Sturm v. Williams Owen Mfg. Co., 201 App. Div. 113, 193 N. Y. Supp. 852;

Walker v. Graham, 233 Ala. 539, 172 So. 655;

Gotham Silk Hosiery Company v. Artcraft Silk Hosiery Mills, 147 F. (2d) 209, 216;

Sheldon v. Metro-Goldwyn Pictures Corporation, 106 F. (2d) 45, 50, 55;

Sheldon, et al. v. Metro-Goldwyn Pictures Corp., et al., 309 U. S. 390, 408, 60 S. Ct. 681, 84 L. Ed. 825.

(D) Defendant's Cases Respecting Market Value Are Not in Point. Intrinsic Value of Property May Always Be Shown Where Market Value Does Not Exist. Page 82.

Sinclair Ref. Co. v. Jenkins, 289 U. S. 689, 699, 53 S. Ct. 736, 77 L. Ed. 1449;

Standard Oil Co. v. So. Pac. Co., 268 U. S. 146, 45 S. Ct. 465, 69 L. Ed. 890;

Feather River Lbr. Co. v. U. S., 30 F. (2d) 642 (C. C. A. 9);

Weed v. Lyons Pet., 294 Fed. 725 (affirmed 300 Fed. 1005);

Austin v. Millsbaugh & Co., 90 Miss. 354, 43 So. 305;

Jacksonville T. & K. W. Ry. Co. v. Peninsular etc. Co., 27 Fla. 1, 57, 9 So. 661, 689.

(E) Appellants Err in Contending That the Damages Found By the Court to Have Been Suffered by Plaintiff From Universal's Infringements Were Rendered Uncertain By Reason of Columbia's Infringements. Page 87.

Great A. & P. Tea Co. v. A. & P. Radio Stores, 20 Fed. Supp. 703, 706.

- (F) Defendants Err in Contending That Plaintiff's Actual Damages "Should Not Exceed the Sum of \$5,000." It Is Untrue That Defendant Universal "Established That It Was Not Aware That It Was Infringing" and That Its Infringements "Could Not Have Been Reasonably Foreseen." Defendant Universal Is Fully Chargeable With Knowledge and Notice of Matters Known to Its Agents and Employees While Acting Within the Course and Scope of Their Agency and Employment. Page 90.

Fletcher Cyclopedia of the Law of Private Corporations, Vol. 4, Chap. 42, Par. 2215, p. 3430;

Simmons Creek Coal Co. v. Doran, 142 U. S. 417, 12 S. Ct. 239, 35 L. Ed. 1063;

Curtis etc. Co. v. U. S., 262 U. S. 215, 222, 43 S. Ct. 570, 67 L. Ed. 956;

Schnieder v. Thompson, 58 F. (2d) 94, 96;

Shapiro Bernstein & Co. v. Velten, 47 Fed. Supp. 648;

Sheldon v. Metro-Goldwyn Pictures Corp., et al., 106 F. (2d) 45, 50, 309 U. S. 390, 397.

Christian v. American Druggist Syndicate, 285 Fed. 359 (C. C. A. 2d).

Point IV.

THE COURT DID NOT ERR IN SUSTAINING OBJECTIONS TO IMPROPER AND INCOMPETENT QUESTIONS ASKED HIRLIMAN. Page 93.

- (A) The Court Properly Sustained Objections to Argumentative and Improper Questions Propounded by Defendants to Harold Lloyd Whom They Called as Their Own Expert Witness and Stipulated They Would be Bound by His Testimony. Page 93.

Harold Lloyd Corporation v. Witwer, 65 F. (2d) 1, 5.

- (B) The Court Properly Excluded Hirliman's Proposed Testimony That Thirteen Years Prior to Trial, He Had Personally Purchased Reissue Rights in an Old SILENT Lloyd Picture Entitled "Girl Shy." Such Testimony Was Incompetent for All Purposes; It Did Not Contradict Lloyd, and It Could Not Establish the Value of Reissue Rights in a TALKING Picture in 1945. Page 96.

Point V.

DEFENDANT UNIVERSAL'S ATTEMPT TO INVOKE THE DOCTRINES OF LACHES AND ESTOPPEL FOR THE FIRST TIME ON APPEAL MUST FAIL. Page 99.

- (A) The Evidence Shows No Laches and in No Event Is the Doctrine Applicable to an Action at Law for Damages. Page 99.

Ferryboatman's Union of Calif. v. Northwestern Pac. R. Co., 84 F. (2d) 773 (C. C. A. 9);

Ashton v. Glaze, 95 F. (2d) 427 (C. C. A. 9);

Haas v. Leo Feist, Inc., 234 Fed. 105.

- (B) No Issue of Equitable Estoppel Was Presented in the Trial Court or Is Substantiated by the Record. Page 102.

Point VI.

APPELLANT BRUCKMAN IS A JOINT TORT FEASOR JOINTLY LIABLE AS A CONTRIBUTORY INFRINGER FOR ALL DAMAGES SUSTAINED THROUGH INFRINGEMENT UPON PLAINTIFF'S COPYRIGHT. Page 105.

Cain v. Universal Pictures Co., 47 Fed. Supp. 1013;

Harris v. Miller, 50 U. S. P. Q. 625 (D. C. S. D. N. Y.);

Gross v. Van Dyke Gravure Co., 230 Fed. 412, 414, 144 C. C. A. 554 (2d C. C. A.);

American Telephone v. Radio Audio, 281 Fed. 200, 203;

Towle v. Ross, 23 Fed. Supp. 125 (D. C. Ore.).

POINT I.

Plaintiff's Motion Picture "Movie Crazy" Is a "Dramatic Work" Protectible Under Sub. (d), Section 1, of the Copyright Act.

Appellant Bruckman contends that "plaintiff's photoplay as a whole is not within the provisions of sub. (d) of Section 1" (App. Bruckman's Op. Br. pp. 58-60) and that "plaintiff's comedy is not within the provisions of sub. (d) of Section 1 because while it is entertainment it is not dramatic composition." (App. Bruckman's Op. Br. pp. 47-49.) Appellant Bruckman is in error.

The same contention was made in *Vitaphone Corp. v. Hutchinson*, 19 Fed. Supp. 359, where the defendants contended that motion pictures consisting of only one or two reels of "slapstick comedy" were not copyrightable under Section 1(b) of the Copyright Act, but the Court stated at page 360:

"The defendants contend that these motion pictures are not within the Copyright Law. I do not think there is much merit to this contention. All of the pictures are what are known in the trade as 'shorts'—that is, they run for periods from ten to twenty minutes, and are used as fill-ins between the feature pictures, news reels, and other pictures on the program. The subjects are comedy, and while they are of the 'slapstick' type, they, nevertheless, have a story to them. . . .

"In the instant case, the reduction of the story, such as it is, to a motion picture is a dramatization of the work. I, therefore, find and rule that the copyrighted pictures in question are within the meaning and terms of the Copyright Act."

18 *Corpus Juris Secundum* 233:

“Motion picture photoplays are dramatic works within the statute and are within the meaning of the words ‘any transcription or record thereof’ giving the owner of a copyrighted drama the exclusive right to make transcriptions or records for exhibition. They may be infringed by the multiplication or sale of copies or by unlicensed exhibition or by other motion pictures making use of parallel situations.” (Citing *Tiffany Productions v. Dewing*, 50 F. (2d) 911; *Metro-Goldwyn-Mayer Dist. Corp. v. Bijou Theater*, 59 F. (2d) 70; *Hutchinson Amusement Co. v. Vitaphone*, 93 F. (2d) 176.)

See also:

Kalem v. Harper Bros., 222 U. S. 55, 32 S. Ct. 55, 56 L. Ed. 92;

Patterson v. Century Productions, Inc., 19 Fed. Supp. 30; affirmed 93 F. (2d) 489; Cert. Den. 303 U. S. 655, 58 S. Ct. 759, 82 L. Ed. 1114.

Herbert A. Howell, formerly Assistant Registrar of Copyrights, in his book on “Copyright Law” published in 1942, expressly states at page 23:

“A photoplay in the literal sense is a play exhibited pictorially whether accompanied by dialogue in ‘sound’ or not; but it is not essential that it be based upon or reproduce an existing dramatic composition. . . . Many so-called ‘shorts,’ a little comedy subject used to fill in between the main features, are deemed photoplays by virtue of the action displayed.”

Appellant Bruckman's contention that "MOVIE CRAZY" does not come within the protection of subdivision (d) of Section 1 and that "MOVIE CRAZY" may "perhaps be regarded as a photograph or series of photographs" under subdivision (a) (App. Bruckman's Op. Br. p. 60), is completely dissipated by the foregoing authorities expressly holding a motion picture—even a "slapstick" comedy short—to be a dramatic work covered by subdivision (d) of Section 1.*

*Excerpts from the Code of Federal Regulations are apparently printed at pages 4-5 of the Appendix to appellant Bruckman's brief for the purpose of implying that the regulations of the Copyright Office exclude "motion picture shows" from the category of "dramatic compositions." Of course the reason the Copyright Office does not permit classification of a "motion picture show" as a dramatic or dramatico-musical composition is that Section 5 specifies thirteen classes of applications for registration, of which classification "(d)" is "dramatic or dramatico-musical compositions"; classification "(l)" is "motion picture photoplays," and classification "(m)" is "motion pictures other than photoplays."

As stated in *Tiffany v. Dewing*, 50 F. (2d) 911:

"There would seem to be no escape from the conclusion that plaintiffs are nevertheless entitled to invoke the protection of Section 1 (d) on the ground that the 'motion picture photoplay' is a 'dramatic work' . . .

"To the contention that since Section 5 has separate classifications for dramatic or dramatico-musical compositions for motion picture photoplays, therefore Section 1 (d) is not to be interpreted as embracing the latter, it is sufficient to point out that the classification of Section 5 is merely for the convenience of the Copyright Office and of applicants for copyrights."

POINT II.

Fifty-seven Consecutive Comedy Scenes Constituting One Thousand Consecutive Feet of Film and 20% of Plaintiff's Entire Feature Length Photoplay Is Protectible Under the Copyright Laws Because It Constitutes a New, Novel and Original Combination of Characters, Scenes and Incidents Arranged in a New Pattern and Sequence.

Both appellants strongly urge that the sequence in question is not protectible under the Copyright Laws because it consists merely of isolated "gags," "stage business," "clowning," and "sleight-of-hand tricks" which constitute "grotesque, hobblehedoy" and which do not contain "a thread of consecutively related events." (App. Bruckman's Op. Br. pp. 52, 58; App. Universal's Op. Br. pp. 1, 20, 21, 23, 33, 42, 48-53.)

We submit that a bare inspection of the sequence in question answers appellant's arguments. Furthermore, after hearing all of the evidence, the Trial Court found as a fact that 57 consecutive scenes (1000 continuous feet of film in the seventh and eighth reels consisting of approximately 20% of plaintiff's motion picture photoplay) had been "knowingly, wilfully and deliberately copied, misappropriated, and plagiarized by defendants," "including characters, characterization, motivation, treatment, action and sequence of action." [Finding VII, Tr. pp. 34, 35.]

The screen "continuities" produced by plaintiff and defendant each reflect 57 separate consecutively numbered scenes in substantially identical sequence which have been copied in almost every detail. [Compare Plaintiff's Ex. 3, copy of the continuity and dialogue of "So's YOUR

UNCLE," Reel 4, pp. 1-9 incl., Scenes 1 to 57 incl., with Plaintiff's Ex. 5, continuity and dialogue of "MOVIE CRAZY," Reel 7, Scenes 22-25, pp. 6-8; Reel 8, Scenes 1-57, pp. 1-10 incl.]

Defendant Universal attempts to minimize the piracy by summarizing the misappropriated material in ten lines. (App. Universal's Op. Br. pp. 4-5.) Appellant Bruckman attempts to minimize the misappropriation by a reduction to thirty-three lines. (App. Bruckman's Op. Br. pp. 9-10.)*

Neither appellant purports to find any similarity in characters, characterization, motivation, or treatment of the various scenes in the sequence, nor any "dramatic quality in the entire material misappropriated." Yet appellant Bruckman reluctantly admits that "in Movie Crazy the routine is built around the idea of embarrassment to Harold" and "from beginning to end Harold is under a cloud, is embarrassed by the incidents that occur, and is in jeopardy of greater embarrassment of being thrown out." (App. Bruckman's Op. Br. p. 16.)**

In both pictures, an elderly dowager has promised to help the young man in his professional career and the events at the dance not only prove embarrassing to the

*Sixteen separate consecutive scenes (Scenes 15-30 Incl., Reel 8) in "MOVIE CRAZY" are dismissed by appellant Bruckman in seventeen words. Many scenes are not even referred to although copied verbatim (*e. g.*, Scenes 50-56, Incl.).

**Isn't there any embarrassment to Steve (the would-be playwright) in defendant's picture "So's YOUR UNCLE"? Isn't Steve in danger of being thrown out because he gets into the magician's coat by mistake and causes pandemonium on the dance floor in precisely the same manner and by the same means and incidents in the same succession and sequence as Harold, the would-be actor, in plaintiff's picture?

young man but appear to be catastrophic to the aid he has been promised. In both pictures the young man is not expected at the dance by the young woman with whom he is in love. In both pictures she comes to the dance escorted by another young man who loves her and despises the hero. In both pictures the sequence at the night club ends with the hero and the girl confessing their love to each other. In both pictures the career of the young hero is not affected adversely by his confusion and embarrassment at the night club and eventually plaintiff's actor gets his long-wanted contract to act and defendant's playwright secures his long-wanted production for his play.

Lloyd's evidence was that "the whole sequence is naturally tied into the story; it is the heart of our story and without that particular sequence tied into it the story is certainly destroyed" [Tr. p. 147]; that the sequence is an "integral and essential part of the story and plot" of "MOVIE CRAZY" and "plays a functional part in the development of the picture" and "is one of the funniest sequences I have ever had in any picture" [Tr. pp. 138-139]; that it was an "outstanding comedy sequence" in his career, and was "the little gold nugget that we searched for to make the picture." [Tr. p. 141.]

Neither appellant has the temerity to argue that the particular succession of 57 scenes (or in fact any *two consecutive scenes*) appearing in the plaintiff's photoplay "MOVIE CRAZY" was ever produced or appeared in any motion picture except plaintiff's own photoplay entitled "WELCOME DANGER" from which it was eliminated after the expenditure of from \$75,000 to \$80,000 [Tr. p. 144]; that "more new material was added in order to adapt the sequence to 'Movie Crazy'"; it "took a great deal of time

to prepare it for this picture.” [Tr. p. 144.] In preparing “MOVIE CRAZY” the plaintiff expended \$63,373.67 in the employment of eleven writers. [See Plaintiff’s Ex. 2, Tr. p. 174.] The total production cost of plaintiff’s picture was \$652,853.86 and it took 21 months to prepare and produce the picture, from October 13, 1930, until July 31, 1932. [Tr. p. 175.] The magician’s coat sequence of 1000 feet in reels 7 and 8 was “probably the most expensive” of the sequences in the picture. [Tr. p. 146.]

If the initial cost of \$75,000 to \$80,000 incurred during the production of “WELCOME DANGER” is added to 20% of the pro rata production cost of “MOVIE CRAZY,” to-wit: \$125,000, *the actual cost to the plaintiff-corporation of preparing and producing the misappropriated sequence was in excess of \$200,000.*

This is the material which appellants claim can be pirated by them with impunity because they say it is “commonplace.”

By a process of dissection appellants contend their evidence shows among other “sources” that a stage magician once played in a vaudeville act “where things used to drop out of his coat” [Tr. p. 321] and that Charlie Chaplin once made a picture where he was an escaped convict and “made a couple of passes as if he were a magician” in taking silverware out of another convict’s pocket. [Tr. pp. 321-322.] However, appellants do not contend that the scenes, incidents, or sequences misappropriated by defendants ever previously appeared in the same combination, arrangement or form devised and created by Lloyd’s large staff of writers. [See Plaintiff’s Ex. 2, Tr. p. 174.]

The genius of Lloyd's ten writers was in taking commonplace materials and weaving a new and original fabric, a different treatment, and an unusual combination of the common things. It is their *new combination* and *novel arrangement* which is protectible under the law, and which the defendants have pirated.

Appellant Bruckman himself conceded on the witness stand that prior to plaintiff's production of "MOVIE CRAZY" he had never seen "that particular combination" of scenes or incidents anywhere before [Tr. p. 94]; and that as far as he knew the "particular sequence of action" was "original." [Tr. p. 95.] The law is clear that a new and original combination of incidents and events is protected by copyright.

13 *Corpus Juris* 1146:

"Originality in dealing with incidents familiar in life or fiction lies in the *association and grouping of those incidents* in such a manner that the work under consideration presents a new conception or a *novel arrangement of events*. The copyright protects this element of originality and *it is an infringement to appropriate a novel combination of old or stock incidents and situations.*"

In *Corelli v. Gray*, 30 L. T. Rep. 116, the defendants contended that they were free to use "stock incidents" but the Court held the combination and association of incidents to be protectible, stating at page 117:

"But the combination of these ordinary materials may nevertheless be original. . . . When it appeared that not merely one, two or three stock incidents had been used but a *combination of stock incidents*, every one of which had been taken from the

plaintiff's book, it would be narrowing the law beyond what was reasonable to say the plaintiff was not entitled to be protected."

In *Dymow v. Bolton*, 11 F. (2d) 690 (2d C. C. A.), the Appellate Court stated:

"If the appropriation complained of is of the '*combination or series of dramatic events* apart from the dialogue which makes up' a particular scene, reference may be had to *Daly v. Webster*, 56 F. 483, 4 C. C. A. 10; *Dam v. Kirk Co.*, 175 Fed. 902, 99 C. C. A. 392, 41 L. R. A. (N. S.) 1002, 20 Ann. Cas. 1183; *Chappell v. Fields*, 210 F. 864, 127 C. C. A. 448. And it will be quite plain that no mere plot or so-called theme was protected by these decisions. They assert the legal proposition that *there may be dramatic compositions in the invention and arrangement of a series of events* although the 'dialogue (coincident with the events) is unimportant and as a work of art trivial.' (56 F. at p. 486, 4 C. C. A. 19.)"

In *Edwards & Deutsch v. Boorman*, 15 F. (2d) 35, the Seventh Circuit Court of Appeals stated:

"*The materials used are all old and in the public domain, but the selection, the ordering, and arrangement are new and useful, and copyrightable.*

"In deciding the question of infringements, the first and most obvious thing to do is to compare the productions themselves. The copyrightable feature of appellant's production being a *particular plan, arrangement, and combination of materials*, the identity of such plan, arrangement and combination of similar materials, found in appellee's production, not only suggests, but establishes the claim of copying."

See also:

Sheldon v. Metro-Goldwyn-Mayer Pictures Corp.,
81 F. (2d) 49, 53, 54;

Italian Book Co. v. Rossi, 27 F. (2d) 1014;

National Institute v. Nutt, 28 F. (2d) 132, 134,
affirmed 31 F. (2d) 236.

Defendants cannot break down and dissect the outstanding sequence in plaintiff's picture for the purpose of persuading this Court that the sequence as a whole is in the public domain. (See Point II B, *post*, pp. 36-43.) There is no suggestion in the evidence that anyone other than plaintiffs' writers ever wrote or produced a similar sequence with similar "arrangements," "adornment," "trimming," or sequence of incidents or action. Even one reel of slapstick comedy which is not related or integrated into a feature length motion picture is protectible by copyright. (*Vitaphone Corp. v. Hutchinson*, 19 Fed. Supp. 359 at 360.) One thousand to 1500 feet of wild animal pictures is protected by copyright. (*Patterson v. Century Productions Inc.*, 19 Fed. Supp. 30, affirmed 93 F. (2d) 489 (2d C. C. A.). Animated cartoons are protected by copyright. (*Corcoran v. Montgomery Ward*, 121 F. (2d) 572 (9th C. C. A.). So-called "comics" such as "THE BAT MAN" are protected. (*Detective Comics Inc. v. Fox Pub.*, 46 Fed. Supp. 872; *Detective Comics Inc. v. Bruns Publications, Inc.*, 111 F. (2d) 432.) A single cartoon character is protected. (*Fleischer Studios Inc. v. Freundlich Inc.*, 5 Fed. Supp. 808, affirmed 73 F. (2d) 276 (2d C. C. A.); Cert. Den. 294 U. S. 717, 55 S. Ct. 516, 79 L. Ed. 1220.

- (A) MISAPPROPRIATION AND COPYING OF A MAJOR SEQUENCE OF A FEATURE LENGTH MOTION PICTURE CONSTITUTES INFRINGEMENT OF A "MATERIAL PORTION" AND A "SUBSTANTIAL PART" OF PLAINTIFF'S COPYRIGHTED WORK. THE WHOLE NEED NOT BE TAKEN IN ORDER TO CONSTITUTE PIRACY.

National Institute v. Nutt, 22 F. (2d) 132 at 135:

"To constitute an invasion of copyright it is not necessary that the whole of a work should be copied, nor even a large portion of it in form or substance, but that, if so much is taken that the value of the original is sensibly diminished, or the labors of the original author are substantially, to an injurious extent, appropriated by another, that is sufficient to constitute an infringement." (Quoting *West Publishing Company v. Thompson*, 169 Fed. 833, at p. 854.)

Ansehl v Puritan (8th C. C. A.), 61 F. (2d) 131 (Cert. Den. 287 U. S. 666, 53 S. Ct. 224, 77 L. Ed. 374):

"A copy of a 'substantial part' constitutes an infringement. It is not necessary that the whole composition be rifled. *Parris v. Hexamer, supra*; *Merriam Co. v. United Dictionary Co.*, 146 Fed. 354 (C. C. A. 7th) (affir'd 208 U. S. 260, 28 S. Ct. 290); *Springer Lithog. Co. v. Falk*, 59 Fed. 707 (C. C. A. 2d); *Meccano v. Wagner*, 234 Fed. 912 (D. C. S. D. Ohio)."

Fendler v. Morosco, 253 N. Y. 281:

"A part, however small, of a work which is appropriated is material where the result of the appropriation is the suggestion or impression of similarity or identity. (See *West v. Francis*, 5 B. & Ald. 737;

Hanfstaengl v. Baines & Co., Ltd. (1895), A. C. 20;
Boosey v. Empire Music Co. Inc., 224 Fed. Rep. 646;
Chicago Record-Herald Co. v. Tribune Assn., 275
Fed. Rep. 797.)”

Harms v. Cohen, 279 Fed. 276:

“That the playing consisted of short excerpts is no
defense. (*Folsom v. Marsh*, 2 Story 100, Fed. Cas.
No. 4, 901; *Daily v. Palmer*, Fed. Cas. No. 3, 552;
Hein v. Harris (C. C.), 175 Fed. 875, affirmed 183
Fed. 107, 105 C. C. A. 399; *Boosey v. Empire Music*
Co. (D. C.), 224 Fed. 646.)”

Chicago Record-Herald Co. v. Tribune Assn., 275 Fed.
797 at 799:

“Any unauthorized use, copy or appropriation is
not to be neutralized on the plea that ‘it was such a
little one.’”

See also:

Sheldon v. Metro-Goldwyn-Mayer (2d C. C. A.),
81 F. (2d) 49;

De Acosta v. Brown (2d C. C. A.), 146 F. (2d)
408; Cert Den. 325 U. S. 862, 65 S. Ct. 1198;

King Features Syndicate v. Fleischer (2d C. C.
A.), 299 Fed. 533;

Hartfield v. Peterson (2d C. C. A.), 34 U. S. P. Q.
305, 91 F. (2d) 998;

Hill v. Whalen, 220 Fed. 359.

(B) PURPORTED DISSIMILARITIES, CHANGES, OMISSIONS, ADDITIONS, AND VARIATIONS MADE BY DEFENDANTS WILL NOT EXCUSE, EXONERATE, OR EXCULPATE DELIBERATE INFRINGEMENT.

Confronted with uncontradicted evidence that Universal's writer Bruckman and Universal's producer Yarbrough deliberately copied and misappropriated 20% of plaintiff's motion picture "MOVIE CRAZY" [see Finding VII, Tr. pp. 34, 95-96], appellants nevertheless claim exoneration because this outstanding sequence was colorably imitated by defendants "with different locale, different actors, different characters, different dialogues and different costumes" which defendants contend were used by them "to a different purpose." (App. Bruckman's Op. Br. p. 70.)

Of course the common purpose in both plaintiff's and defendants' picture was comedy, and any observer will see substantially the same sequence of incidents and emotions portrayed on the screen and will feel the same emotional reaction himself as the comedy sequence reaches its common climax in both pictures.

How could defendants in 1943 possibly infringe upon a motion picture photoplay made ten years earlier unless they used "different actors" and "different costumes"? The only difference in locale is that one is a hotel night club and the other is apparently a night club not located in a hotel. Such colorable differences cannot serve to exculpate defendant's piracy.

In *Boosey v. Empire Music Co.*, 224 Fed. 646 at 647, there was only one phrase common to two musical compositions which the Court found were otherwise "consider-

ably different both in theme and execution.” Yet the Court granted an injunction upon the ground that the plaintiff’s copyright had been infringed in only one particular, as to which the Court found “marked similarity.” The Court stated at page 647:

“The composition which plaintiffs own is of a dignified character, has been sung by a distinguished singer, and has as its basic theme a living person standing on the grave of his dead loved one and hearing her voice. The composition owned by defendant is in syncopated time (familiarily known as ragtime), has been sung by a master of that art, and expresses the desire of a negro to go back to his old home in Tennessee. The two compositions are considerably different, both in theme and execution, except as to this phrase, ‘I hear you calling me,’ and, as to that, there is a marked similarity. . . . The ‘I hear you calling me’ has the kind of sentiment in both cases that causes the audiences to listen, applaud, and buy copies in the corridor on the way out of the theater.”

As stated by the Court in *Pellegrini v. Allegrini*, 2 F. (2d) 610:

“ . . . There may be any number of differences between the two and yet the finding (of infringement) be unhesitatingly made.”

The fact that defendants may have added or changed plaintiff’s precise mode of expression is not a defense:

Nutt v. National Institute, 31 F. (2d) 236 (2d C. C. A.):

“Copying is not confined to a literal representation but includes various modes in which the matter of

any publication may be adopted, imitated or transferred with more or less colorable alteration.”

King Features Syndicate v. Fleischer, 299 Fed. 533 (2d C. C. A.):

“The disguise of a source from which the material was derived does not defeat the protection of a copyright nor does taking a part of the work constitute an evasion of the copyright. . . . We do not think it avoids the infringement of the copyright to take the substance or idea and produce it through a different medium. . . .”

In *Fleischer Studios Inc. v. Freundlich Inc.*, 73 F. (2d) 276, the Court said the test of infringement is whether the infringing work is “recognizable by an ordinary observer as having been taken from the copyright source. Such is an infringement. . . . Slight difference and variations will not serve as a defense.” (Cert. Den. 294 U. S. 717, 55 S. Ct. 516, 79 L. Ed. 1220.)

See also:

Daly v. Palmer, 6 Fed. Cas. 3552;

Dam v. Kirk LaShelle, 166 Fed. 589, affirmed 175 Fed. 902 (2d C. C. A.);

Maurel v. Smith, 220 Fed. 195;

Sheldon v. Metro-Goldwyn-Mayer, 81 F. (2d) 49;

Barsha v. Metro-Goldwyn-Mayer, 32 Cal. App. (2d) 556, 562.

(C) PUBLIC DOMAIN IS NOT A DEFENSE WHERE THE PRECISE COMBINATION AND ARRANGEMENT OF 57 SCENES IN CONSECUTIVE SEQUENCE NEVER PREVIOUSLY EXISTED IN THE SAME FORM AND COMBINATION AS THAT CREATED AND DEvised BY PLAINTIFF'S WRITERS. IN NO EVENT WOULD DEFENDANT HAVE ANY RIGHT TO COPY SLAVISHLY FROM PLAINTIFF'S WORK.

Both appellants argue that no copyright can protect such common materials as magician's slight-of-hand performances, dancing, changing clothes, etc., regardless of any new or novel use, combination or arrangement of the old materials. Under the heading of "public domain" appellant Bruckman claims that many "ideas" in Lloyd's picture were "commonplace" because "the idea of changing clothes goes back to Aesop's Fable 'The Wolf In Sheep's Clothing,' " and the idea of " 'conjuring . . . is familiar to readers of Arabian Nights,' " etc. (Bruckman's Op. Br. p. 17.)

Bruckman himself testified however, that as far as he knew getting into a magician's coat by mistake was original with Lloyd [Tr. p. 95] and even his resourceful counsel does not claim that anything remotely resembling the "magician's coat sequence" of "Movie Crazy" had its counterpart, source, or origin, in Aesop's Fables or the Arabian Nights.

Likewise "magician's acts" may have been witnessed on the vaudeville stage and elsewhere by Bruckman but he frankly admitted on the witness stand that "the particular combination of gags with the particular sequence of action as finally depicted on the screen of Movie Crazy" was, as far as he knew, "original." [Tr. p. 95.]

Since Bruckman does not contend that he himself originated the novel sequence copied by Universal or even that he did any original work or research in connection therewith, the argument of his counsel relating to isolated magician's acts, incidents or gags, previously known to magicians or others, becomes immaterial.

The law is well settled that "slavish copying" of a new and original combination of old materials cannot be justified by a defense of public domain. The latter is available only when the subsequent use of the old materials is the sole result of independent research and original compilation or combination by the subsequent user.

In *Fisher v. Dillingham*, 298 Fed. 145, the defendants contended that the identical material which the plaintiff claimed had been taken from him was in the public domain and that therefore it was (1) not copyrightable and that (2) public domain was an absolute defense. Judge Learned Hand held both contentions untenable, stating at page 146:

"Any subsequent person is, of course, free to use all the works in the public domain as sources for his compositions. No later work, though original, can take that from him. But there is no reason in justice or law why he should not be compelled to resort to the earlier works themselves, or why he should be free to use the composition of another, who himself has not borrowed. If he claims the rights of the public, let him use them; he picks the brains of the copyright owner as much, whether his original composition be old or new. The defendants' concern lest the public should be shut off from the use of works in the public domain is therefore illusory; no one suggests it. That domain is open to all who tread it; not to those who invade the closes of others."

The Second Circuit Court of Appeals more recently disposed of similar contentions urged in connection with an infringement of the copyright upon "Superman" comics stating:

In *Detective Comics, Inc. v. Bruns Publications, Inc.*, 111 F. (2d) 432:

"Defendants attempt to avoid the copyright by the old argument that various attributes of 'Superman' find prototypes or analogues among the heroes of literature and mythology. But if the author of 'Superman' has portrayed a comic Hercules, yet if his production involves more than the presentation of a general type, he may copyright it and say of it: 'A poor thing but mine own.' Perhaps the periodicals of the complainant are foolish rather than comic, but they embody an *original arrangement of incidents* and a pictorial and literary form which preclude the contention that Bruns was not *copying the antics* of 'Superman' portrayed in 'Action Comics.' We think it plain that the defendants have used more than general types and ideas and have appropriated the pictorial and literary details embodied in the complainant's copyrights.

"We have repeatedly held that, irrespective of the sources from which the author of a work may derive the material which he uses, a picture or writing which is his own production cannot be copied. The prior art is only relevant as bearing on the question whether an alleged infringer has copied the author or has taken his material directly from the prior art (Sheldon v. Metro-Goldwyn Pictures Corporation, 2 Cir. 81 F. (2d) 49, 53).

"So far as the pictorial representations and verbal descriptions of 'Superman' are not a mere delineation

of a benevolent Hercules, but embody an *arrangement of incidents* and literary expressions original with the author, they are proper subjects of copyright and susceptible of infringement because of the monopoly afforded by the Act."

See, also:

Stodart v. Mutual Film Corp., 249 Fed. 507:

"The defendants have copied the plaintiff's copyright much more nearly than that which resembles anything which is in the public domain. A man may take an old story and work it over, and if another copies not only what is old but what the author has added to it when he worked it up, the copyright is infringed." (Aff'd 249 Fed. 513.)

See, also:

Holmes v. Hearst, 174 U. S. 82 at p. 86, 19 S. Ct. 606, 43 L. Ed. 904;

Hartfield v. Peterson (2d C. C. A.), 34 U. S. P. Q. 305, 91 F. (2d) 998.

Since defendants cite English cases throughout their briefs we would like to refer to three modern English cases which also hold that public domain is no defense where it is the new combination of old material which has been copied. In *Graves v. Pocket Publications, Ltd.*, 54 T. L. R. 952, reported by E. J. MacGillivray in his collection of (English) Copyright Cases 1938, the plaintiff's copyrighted work consisted of a collection of facts relating to 26 professions and the average earnings therein. It was contended on behalf of the defendants that there was no infringement in taking from a book of this description "a few figures purporting to be based on as-

certainable facts provided that no part of the language was taken.” Nevertheless the court held that a *single page* printed by the defendants constituted an infringement of plaintiff’s copyright upon a 300-page book containing 60 chapters.

Likewise in *Oliver v. Dickens*, decided July 2, 1936, in Chancery, reported at page 53 in MacGillivray’s copyright cases for 1936, the court held a collection of facts relating to mastiff dogs obviously combined materials in the public domain, but held a defendant liable for copyright infringement who used in only one chapter of a later book some of the plaintiff’s arrangement of the old materials instead of going to common sources in the public domain, the court stating:

“Of course, the plaintiff has not a monopoly in the history of the mastiff, nor in the allusions in literature or records in stone to dogs of that breed, nor in the facts relating to the pedigrees of modern mastiff dogs or similar facts. But . . . another person writing a similar history has no right to use the material which the plaintiff has unearthed and chosen to illustrate and adorn his history . . . without having herself gone to the trouble of searching into the common sources and obtaining her subject-matter from them. She has saved herself pains and labour by availing herself of the pains and labour of the plaintiff.”

See, also, *Holland v. Vivian Van Damm Productions, Ltd.*, decided December 7, 1936, in Chancery reported in MacGillivray’s Copyrighted Cases 1936 where a *ballet* was held to have infringed an Oscar Wilde story although the defendants contended that merely “common stock incidents” had been used. (MacGillivray, p. 74.)

For further application of the same principle in the United States, see, also:

Sheldon v. Metro-Goldwyn-Pictures Corp., 81 F. (2d) 49, 53;

Italian Book Co. v. Rossi, 27 F. (2d) 1014;

National Institute v. Nutt, 28 F. (2d) 132, 134, aff'd 31 F. (2d) 236.

(D) THE SEQUENCE OF SCENES MISAPPROPRIATED BY DEFENDANTS DOES NOT CONSIST MERELY OF ISOLATED "GAGS" AND PIECES OF "STAGE BUSINESS" NOR MERE "COMIC ACCRETION." DEFENDANTS' ATTEMPT TO "BRAND" OR "LABEL" PLAINTIFF'S SEQUENCE IS EXTREMELY MISLEADING.

Throughout the briefs filed by both appellants appears their reiterated contention that "gags" and "stage business" are not protected by copyright and that appellants have misappropriated nothing more. This is a very shrewd attempt to confuse the court by misleading terminology, which has been used in a number of different ways by various courts in an entirely different sense and connotation.

So far as the expression "stage business" is concerned, there can be no possible misunderstanding. Stage business consists of gestures or mechanical movements upon the stage which consist of mere details in acting or staging. Such details are so minor in nature that not infrequently they are entirely omitted from a manuscript of a play and are left to the discretion of the actor or stage director (See Webster's Collegiate Dictionary, p.

137, defining “business” in the theater as “the details in acting or in staging a play usually left to the discretion of actors or directors.”)

We have no dispute whatever with the decisions holding “stage business” not to be protected by copyright: lighting a cigarette, moving a chair, jiggling a telephone, changing clothes, etc. Such “pieces of stage business” are not ordinarily capable of monopoly, yet it has been judicially stated that “a nod, a movement of the hand, a pause” *might be so combined with a series of events as to become protectible*. See *Sheldon v. Metro-Goldwyn-Pictures*, 81 F. (2d) 49, where Judge Learned Hand stated at page 56:

“Speech is only a small part of a dramatist’s means of expression; he draws on all the arts and compounds his play from words and gestures and scenery and costume and from the very looks of the actors themselves. Again and again a play may lapse into pantomime at its most poignant and significant moments; a nod, a movement of the hand, a pause, may tell the audience more than words could tell. To be sure, not all this is always copyrighted, *though there is no reason why it may not be, for those decisions do not forbid which hold that mere scenic tricks will not be protected*. (*Serrano v. Jefferson* (C. C.), 33 F. 347; *Barnes v. Miner* (C. C.), 122 F. 480; *Bloom et al. v. Nixon* (C. C.), 125 F. 977.) The play is the sequence of the confluents of all these means, bound together in an inseparable unity; it may often be most effectively pirated by leaving out the speech, for which

a substitute can be found, which keeps the whole dramatic meaning.”*

Judge Learned Hand thus distinguishes some of the very cases relied on by appellants (*Barnes v. Minor* is quoted at page 51 of appellant Universal’s opening brief and is likewise cited, together with *Bloom v. Nixon*, on page 57 of appellant Bruckman’s Opening Brief).**

We now fully realize that appellants’ very astute counsel at the trial repeatedly asked questions of their own witnesses Hirleman, Bruckman and Adler incorporating the phrase “stage business” in an entirely different sense than that which has heretofore been used in decided cases, and for the purpose of disguising and attempting to “label” the material pirated.

Plaintiff’s witnesses, however, at no time described the sequence of 57 scenes misappropriated by defendants as consisting of “stage business” and although every stage play and every moving picture necessarily contains minor

*The same distinction is noted by Weil On Copyright Law, Secs. 185, 186, quoted in *Harold Lloyd Corporation v. Witwer*, 65 F. (2d) 1, where the well-known text-writer describes what is meant by a dramatic composition as follows:

“It may be the creation or representation of a single transaction but *it must repeat or mimic some action, speech, emotion, passion or character, real or imaginary*. When it does, it is the ideas thus expressed which become the subject of copyright. . . . The merely mechanical movements by which effects are produced on the stage are not subjects of copyright where they convey no ideas whose arrangement makes up a dramatic composition.”

**What has heretofore been accepted as within judicial meaning of “stage business” is well illustrated in *Bloom v. Nixon*, 125 Fed. 977, where according to appellant Bruckman, “stage business” consisted of “making one of the audience uncomfortable by singling him out and singing to him.” (App. Bruckman’s Op. Br. p. 57.)

details of acting which can properly be described as stage business, it is the whole original combination of 57 consecutive scenes including character, dialogue and action with which we are here concerned. [See Finding of Fact VII, Tr. p. 34, and Point II, *supra*, pp. 27-44.]

Other favorite phrases repeatedly used by appellants—and with as little accuracy—are “comedy routine,” and “comedy accretion.”

“Routine” is defined in Funk & Wagnall’s Dictionary of the English Language at page 2139 as follows:

“A detailed method of procedure regularly followed; a prescribed course of action gone through day after day or at regularly recurring periods.”

To describe 57 consecutive scenes slavishly copied from a motion picture photoplay consisting of an *admittedly* original sequence containing incidents arranged in an *admittedly* new combination which *admittedly* had never been used prior to plaintiff’s use, is hardly to be characterized as a “procedure regularly followed” or a “prescribed course of action gone through day after day.”

Likewise, if 57 comedy scenes in sequence are to be termed mere “comic accretion” there is no reason why the entire ten-reel comedy should not be similarly characterized. An isolated single comedy scene may perhaps be considered “comic accretion” in a dramatic play or book; but 57 consecutive scenes constituting a major sequence in a photoplay which is itself a comedy, can hardly be classified as mere “comedy accretion.”

Appellants likewise attempt to confuse this Court by reference to decisions holding “sleight-of-hand perform-

because “so far as the words of the two are concerned it is not denied that the similarities are of the most trifling description,” and “the true construction of the act is that the subject matter . . . protected is something which is capable of being printed and published.” (1 K. B. Div. 830.)

In *Karno v. Pathe Freres* (1908), 99 L. T. Rep. N. S. 114, the court followed the same rule that under the old English statutes as they then existed no infringement could be found where there were “no written words” which the actors spoke or were capable of being reduced to writing.

At page 118 the court stated:

“If indeed it could be shown that in the present case there are words capable of being printed or published as a literary piece, then I think it might be held that the cinematographic reproduction is a representation of a substantial part of the whole piece though of course no words are reproduced and *Tate v. Fullbrook* might on that ground be distinguishable on the facts.”

In 1911, however, a new Copyright Act was passed for the express purpose, among others, of affording *protection to British playwrights which had not theretofore been granted*. The new Act was the Copyright Act of 1911 (1 and 2 Geo. 5, c. 46), and in Section 1, sub. 2 it provided:

“For the purposes of this Act ‘copyright’ means the right to produce or reproduce the work . . . to perform the work . . . and shall include the sole right”

(d) In the case of a . . . dramatic work to make any, . . . cinematograph film or other contrivance by means of which the work may be mechanically performed . . . And to authorize any such acts as aforesaid."

In substance the new statute provides for the same protection offered by our Copyright Act of 1909.

In *Falcon v. Famous Players Film Corp.*, 2 K. B. 474, the English Court of Appeals expressly held that such cases as *Karno v. Pathe Freres* were "*no longer law*" (See opinion of Scrutton, Lord Justice, 474, at p. 496):

"In my view the wording of the act of 1911 was intended to enlarge the protection to authors, and to sweep away those decisions by which their rights had been limited, as against the makers of mechanical instruments by which their works could be reproduced. *The decision in Karno v. Pathe Freres is in my opinion no longer law*, and the three American companies in this case are liable for having infringed the plaintiff's performing right."

In view of this and many other current English decisions, we feel it was incumbent upon defendants to advise this Court that the early English decisions cited by them were decided under Copyright Acts no longer in force or effect and completely divergent from the later Copyright Act of 1911 as well as from the present United States Copyright Act of 1909.

The importance of a particular sequence of scenes containing an original combination of “gags” has heretofore been commented on by this Court in *Harold Lloyd Corp. v. Witwer*, 65 F. (2d) 11, at page 16, where the Court said:

“The testimony is that over 100,000 feet of film were taken in connection with the play, only 7,000 feet of which was actually used. It is obvious from such a process that the purpose is not merely to duplicate scenes in the story or to reproduce them; indeed the story is too general in its description for that, but to develop and produce scenes which would carry to the audience the general plan they had in mind. In the production of the gags there was evidently much rephotographing to get the exact es-
* quence essential to create a laugh in the audience. *None of these gags and no such sequence is in the story.* Consequently there was no effort to reproduce some such humorous situation in the story, but the purpose was to create a separate distinct sequence in the case of each gag to produce laughter on the part of the audience. It is not contended that these matters were copied from the story; on the contrary, it is admitted that there is a large amount of original material in the play. *There is nowhere any slavish copying of anything in the story of Rodney.*”

The true rule applicable alike in England and the United States today is that if there is “slavish copying” of a unique combination of old materials including gags, characters, scenes, and incidents, the Court will not sustain a technical defense of public domain. (See Point II (C), *supra*, pp. 39-44.)

(E) A MAJOR SEQUENCE OF 57 CONSECUTIVE SCENES DOES NOT CONSTITUTE A "SUB-SECTION OF PLOT" OR "SUBORDINATE SEQUENCE OF EVENTS" IN THE SENSE SUCH TERMS HAVE BEEN USED BY THE COURTS TO DESCRIBE GENERAL THEME OR A SINGLE ISOLATED SCENE.

Appellant Universal implies (Op. Br. p. 53) that the sequence of 57 consecutive scenes, deliberately misappropriated by defendants, falls within the phraseology of the opinion in *Dymow v. Bolton*, 11 F. (2d) 690, in which case the Court expressly said, "We don't believe" there was copying.

The term "subsection of a plot," as used in that opinion, was synonymous with what most courts—and the Trial Court in the *Dymow* case—had described as general "theme"; and the Second Circuit Court of Appeals expressly held in the *Dymow* case that the two plays had in common only an "incomplete skeleton" with "no suggestion" of similarity in even the most general features of background. One plot was "almost wholly" about "Jewish society engaged in the cloak and suit industry"; the other play was about theatrical and "movie life" with "no suggestion of either Jewish social life, or a Jewish business background." The test, as cited by the Court, was not whether the two plays had an "incomplete skeleton" (or theme) but whether "the flesh and blood, the incidental, yet essential, adornment and trimming" were the same. (11 F. (2d) 692.) The Trial Court had stated

that “perhaps unconsciously defendant took the theme” (11 F. (2d) 690); the reviewing Court held the general pattern insufficient; that the test was “ordinary observation” and that “it requires dissection rather than observation to discern any resemblances here.” (11 F. (2d) 692.)

The *Dymow* case is not in point for appellants. Ordinary observation shows immediate and spontaneous recognition in the case at bar that defendants copied 57 consecutive scenes in the same novel arrangement, combination and sequence. That this constitutes infringement of copyright, the Second Court of Appeals expressly reaffirmed in the *Dymow* case, stating (11 F. (2d) 690):

“If the appropriation complained of is of the ‘combination or series of dramatic events apart from the dialogue which makes up’ a particular scene, reference may be had to *Daly v. Webster*, 56 F. 483, 4 C. C. A. 10; *Dam v. Kirk Co.*, 175 F. 902, 99 C. C. A. 392, 41 L. R. A. (N. S.) 1002, 20 Ann. Cas. 1173; *Chappel v. Fields*, 210 F. 864, 127 C. C. A. 448. And it will be quite plain that no mere plot or so-called theme was protected by these decisions. They assert the legal proposition that there may be dramatic composition in the invention and arrangement of a series of events although the ‘dialogue (coincident with the events) is unimportant and as a work of art trivial.’ (56 F. at page 486, 4 C. C. A. 19.)”

It is also important to note the emphasis with which Judge Hough treats the findings of fact in *Dam v. Kirk LaShelle Co.*, 175 Fed. at p. 907, that the defendant had

“*deliberately appropriated*” the plaintiff’s material (see 11 F. (2d) 690); which is what the defendants concede they did in the instant case.

Nichols v. Universal Pictures Corporation, 45 F. (2d) 119, cited in support of the same proposition, is likewise not in point for appellants. It also was a case in which general theme or plot was similar, but all the details, “the flesh and blood, the incidental, yet essential adornment and trimming” was different. The *Nichols* case is not applicable where 57 consecutive scenes have been “slavishly” copied. As stated by this Court in *Harold Lloyd Corporation v. Witwer*, 65 F. (2d) at p. 16:

“The question of infringement is narrowed to whether . . . there was an intentional or unintentional *appropriation of incidents and sequences and scenes.*”

Appellant Universal (Op. Br. p. 50) and appellant Bruckman (Op. Br. pp. 38-44), both argue that the decision in *Harold Lloyd Corporation v. Witwer*, 65 F. (2d) 1, is “peculiarly applicable” and “squarely in point”; primarily because of certain phraseology quoted by both appellants and hereinafter set forth. The paragraph is fairly quoted by appellant Bruckman (Op. Br. p. 42), and unfairly quoted by appellant Universal [Op. Br. Appendix p. 6]. We quote the paragraph upon which appellants rely (65 F. (2d) 1, p. 27):

“The only thing in the play approximating a duplication of a scene in the story is that in which the

hero argues with the coach in reference to participating the final plays of the football game. In each case there is an argument, but *the scene*, considered independent from the story and the play merely as a scene or a subordinate sequence of events, is utterly commonplace and incapable of copyright monopoly. It is immaterial, therefore, whether or not there is copying." (P. 27.)

It is apparent from a bare reading of the opinion that this Court used the term "subordinate sequence of events" as synonymous with the term "scene" and not in any way as the equivalent of fifty-seven consecutive scenes "slavishly copied" by appellant. As stated by this Court (65 F. (2d) 1, at p. 27):

"Each case must be determined on its own facts."

So far as the Court's discussion can be deemed applicable to the peculiar facts of the instant case, *Harold Lloyd Corporation v. Witwer* is of no help to appellants. The basis of that decision was as follows:

(1) "There is no such similarity as would impress the ordinary observer." (65 F. (2d) at p. 28.)

(2) "We are of the opinion that such similarities as exist . . . are such as require analysis and critical comparison in order to manifest themselves." (65 F. (2d) at p. 28.)

(3) "It is clear that there is no such similarity as overcomes the positive testimony that there was in fact no copying." (65 F. (2d) at p. 28.)

In the instant case the testimony of defendants themselves showed deliberate copying; the similarities require no analysis or critical comparison to manifest themselves; they impress the "ordinary observer" immediately and spontaneously with their exact duplication and reproduction of plaintiff's sequence of scenes.

If, as appellants claim, *Harold Lloyd Corporation v. Witwer* "controls" the case at bar, it compels a decision for plaintiff here. We respectfully refer this Court to the tests laid down by this Court in that case:

A. "The primary question is whether these similarities resulted from copying the story." (65 F. (2d) 1, at p. 4.)

B. ". . . The question of infringement is narrowed to whether or not in the subsequent development of the play there was an intentional or unintentional appropriation of incidents and sequence and scenes" (65 F. (2d) 1, at p. 10.)

Applying the tests stated above, and the "standard of the ordinary observer" to the instant case, we submit that we have here a concession of copying by the defendants themselves and the literal slavish duplication of 57 consecutive scenes which cannot, under any circumstances, be properly designated as a "subordinate sequence" in the sense in which this Court used and applied that term to a single scene in the *Witwer* case.

POINT III.

Where Plaintiff Pleads and Proves Actual Damages by Deliberate Widespread Infringements, the Courts Will Not Require Precise Mathematical Computation but Will Award a Fair and Reasonable Amount Consistent With the Evidence Both Expert and Otherwise. A Deliberate Infringer Cannot Rely Upon Uncertainty in Amount of Damages Caused by His Own Wilful Tort.

Defendants' argument respecting proof of plaintiff's damages is predicated upon three fallacious assumptions:

(1) That proven past success of a dramatic property creates no element of inherent value;

(2) That the owner of personal property may not testify to its value;

(3) That well qualified experts in production and distribution of motion pictures are incompetent to testify as to the value of motion picture properties which have proven outstanding popular successes in the past.

Defendants have so distorted and misrepresented the evidence respecting damages that it becomes necessary for us to restate the evidence and legal propositions applicable thereto.

Plaintiff's complaint pleaded general damages of \$200,000, and special damages of \$200,000 resulting from destruction of then existing rights to reissue, reproduce and remake plaintiff's copyrighted motion picture photoplay. [Complaint, Pars. X, XI; Tr. p. 5.]

As pointed out in the opening brief filed by us upon our cross-appeal (pp. 15-19) plaintiff showed in support

of its claims to general damages that it had invested over \$652,000 in the production of the motion picture, and \$414,010.14 to distribute; that over \$1,400,000 had been received from distribution and nearly \$400,000 net profit realized at the bottom of the depression period; furthermore that the particular sequence misappropriated by defendants had cost the plaintiff corporation approximately \$188,000. (See Opening Brief for cross-appellant Harold Lloyd Corporation, pp. 15-16.)

Plaintiff did not plead nor seek to rely upon "guesses" as to future profits which might be realized from a "new and untried venture," as repeatedly stated and implied by defendants Universal and Bruckman. (See, *e. g.*, Universal's Op. Br. pp. 53-61, 67.) The evidence showed that the infringed picture was a valuable theatrical property and its cost of production and the past profits secured through its release and distribution were certainly proper elements to be considered in determining the damages caused to the plaintiff by defendant's wilful infringements.

The stipulated evidence showed that the infringing picture containing plaintiff's misappropriated property was exhibited in 6636 theaters throughout the United States. [Tr. p. 90.] As we pointed out in our opening brief for cross-appellant Harold Lloyd Corporation, based upon the stipulations entered into at the trial, there was evidence of 30,000 or more infringing performances. (Cross-App. Lloyd Op. Br. p. 16.)

We firmly believe if there were no other evidence before the Court, the judgment for \$40,000 general damages is more than amply sustained by the proof to which we have heretofore adverted. However, plaintiff's case does not rest solely thereon. The evidence of several expert witnesses, abundantly qualified, shows that the values *inherent* in plaintiff's picture, including the re-issue and re-make values, were destroyed by the exhibition of defendant's infringing picture. We have outlined in detail this evidence in cross-appellant Harold Lloyd's Opening Brief, pages 20-24, and will not repeat it here, except to state that Arthur Landau expressly testified that exhibitors would not purchase the motion picture if re-issued or re-made [Tr. p. 258], and Botsford expressly testified that no producer would purchase the re-make or re-issue rights after Universal had used the most important comedy sequence in the picture. [Tr. p. 465.] Inasmuch as Universal Pictures Corporation employed Landau as an expert witness fifteen years ago in copyright litigation and Botsford is one of the outstanding executives in the business, having been Executive Assistant to the President of Paramount for many years and a member of the Editorial Board of Paramount as well as a producer in his own right, and presently general manager of an outstanding agency, the Trial Court was fully justified in accepting the testimony of such qualified experts, that plaintiff had suffered injury and damage.

Applying the law as reflected in the adjudicated cases to the factual situation as found in this record, we strenuously contend that the judgment is not only amply sustained by the evidence but is inadequate.

(A) ALL OF THE AUTHORITIES REFLECT THE WELL ESTABLISHED RULE THAT MERE UNCERTAINTY AS TO THE AMOUNT AND EXTENT OF DAMAGE WILL NOT DEPRIVE THE PLAINTIFF OF SUBSTANTIAL RECOVERY.

As pointed out in 15 *Am. Jur. (Damages)*, Section 23, page 414:

“There is a clear distinction between the measure of proof necessary to establish the fact that the plaintiff has sustained some damage and the measure of proof necessary to enable the jury to fix the amount. Formerly the tendency was to restrict the recovery to such matters as were susceptible as having attached to them an exact pecuniary value, but it is now generally held that the uncertainty which prevents a recovery is the uncertainty as to the fact of damage and *not as to its amount*. . . . All that can be required is that evidence which such certainty as the nature of the particular case may permit lay a foundation which will enable the trier of facts to make a fair and reasonable estimate, and the plaintiff will not be denied a substantial recovery if he has produced the best evidence available and it is sufficient to afford a reasonable basis for estimating his loss.”

To like effect see 25 *Corpus Juris (Damages)*, Section 28, page 493:

“The rule against the recovery of uncertain damages generally has been directed against uncertainty as to cause rather than uncertainty as to measure or extent.”

At page 494:

“In many cases, although substantial damages are established, the amount is, insofar as susceptible to technical admeasurement, either entirely uncertain or extremely difficult of ascertainment; in such cases plaintiff is not denied all right of recovery and the amount is fixed by the court or by the jury in the exercise of a sound discretion under proper instructions from the court. This is particularly true of torts.”

This brief would be unduly extended if we were to cite all cases applying these rules. We will confine ourselves to a few.

In *Sinclair Refining Co. v. Jenkins*, 289 U. S. 689, 53 S. Ct. 736, 77 L. Ed. 1449, Mr. Justice Cardozo, in writing a unanimous opinion for the Supreme Court, pointed out that a patent was a “thing unique” and that the difficulties in proving value and the amount of damages did not relieve an infringer for liability therefor, stating:

“The law will make the best appraisal that it can, summoning to its service whatever aids it can command.” (At p. 697.)

See also:

Palmer v. Conn. Ry. Co., 311 U. S. 544, 61 S. Ct. 379, 85 L. Ed. 336.

In *Zinn v. Ex-Cell-O*, *supra*, the California Supreme Court stated at 24 Cal. (2d) 297:

“One whose wrongful conduct has rendered difficult the ascertainment of the damages cannot escape

liability because the damages cannot be measured with exactness.”

U. S. Frumentum Co. v. Lauhoff, 216 Fed. 610, 617.

In *President etc. v. Kelby*, 147 F. (2d) 465 at p. 476 (Cert. Den. 324 U. S. 866, 65 S. Ct. 916, 89 L. Ed.), the Court said:

“This case is governed by the rule that, where one has committed a wrong which renders impossible the exact ascertainment of damages, the risk of the uncertainty should be thrown upon the wrongdoer instead of upon the injured party. . . . (*Story Parchment Co. v. Patterson*, 282 U. S. 555, 563, 51 S. Ct. 248, 251, 75 L. Ed. 544.)”

In *John B. Stetson Co. v. Stephen L. Stetson*, 85 F. (2d) 586, 596 (Cert. Den. 299 U. S. 605, 57 S. Ct. 232, 81 L. Ed. 446), the Court, in commenting upon the amount of damages, said:

“That the result be only approximate is not fatal; the wrongdoer should not be permitted to escape because of lack of certainty.”

Even the cases cited by defendants recognize these rules. In *Union Oil Co. of Cal. v. Hunt*, 111 F. (2d) 269 (cited by defendant Universal in its opening brief, p. 53), the Court clearly pointed out this distinction and, following the language quoted by defendant Universal, said at page 277:

“No recovery can be had where it is *uncertain whether plaintiff suffered any damage.*”

In *Horlick's Malted Milk Corp. v. Horlick's, Inc.*, 59 F. (2d) 13, a trade mark case cited by defendant Universal (Op. Br. p. 53), the opinion clearly discloses that the plaintiff and defendant were not in competition; there was no evidence of damages, and plaintiff's own witness testified that they lost no business.

In *Electrical Research Products, Inc., v. Gross*, 125 F. (2d) 912, cited by defendant Universal (Op. Br. p. 54), the Court in its opinion clearly showed a total absence of evidence to show any causation between defendant's act and plaintiff's alleged damage. There was absolutely no showing that plaintiff had suffered damages.

In *Montgomery v. Chicago, B. & Q. R. Co.*, 228 Fed. 616, quoted by defendant Universal (Op. Br. p. 54), the Court held that the complaint did not state a cause of action; there had never been a trial; the facts are completely dissimilar to the case at bar and can afford no comfort to the defendants.

Broadway Photoplay Co. v. Real Film Corp., 225 N. Y. 104, 121 N. Y. 756, cited by defendant Universal (Op. Br. p. 54), was an action for breach of contract to supply the plaintiff with first run feature motion pictures for exhibition at its theatres. Evidence was received as to *what plaintiff had made by way of profits from other pictures produced by other producers*. There was no other evidence in any way tending to show that plaintiff had been damaged, or the returns from the pictures defendant refused to supply plaintiff. The case was reversed because of an erroneous charge to the jury. However, the Court recognized the well established rule when it said:

"The plaintiff was not required to prove its damages to the dollar."

The balance of defendant Universal's cases cited in their opening brief (pp. 55 through 58) deal either with complete lack of evidence to show any damages or have absolutely no bearing on the instant case. Defendant Universal has selected isolated statements from the opinions in the cases they have cited, stripped them of their factual background, and have attempted to use them to distort their actual holding.

In *Muther v. United Show Machinery Co.*, 21 F. (2d) 773 (cited in Universal's Op. Br. p. 58), the Court allowed plaintiff \$241,839 for patent infringement, using as its basis the "reasonable royalty" theory. The Court pointed out that the "particular sum arrived at has to be more or less arbitrarily found on the basis of general evidence" (p. 777), and

"The finding of the master, that a reasonable royalty was half way between the royalty paid by the Atlas Tack Co. and the established royalty for years, while more or less arbitrary, has general evidence to justify it." (At p. 778.)

The opinion clearly demonstrates that the problem confronting the Court was *not* uncertainty as to amount of damages but uncertainty as to whether defendant's acts had caused any damage.

In *Paramount Productions v. Smith*, 91 F. (2d) 863 (9th C. C. A.), this Court affirmed a judgment for \$7,500 damages to plaintiff for deprivation of screen credit by the defendant motion picture corporation when it produced a picture based upon plaintiff's work. The only evidence offered in support of plaintiff's claim was (1) evidence of the purchase price received for another and different story

written by the plaintiff in collaboration with another author, and (2) the writer's testimony that after he had received screen credit for another and different literary work, his salary increased from \$250 per week to \$350 per week at one time, and \$500 for another two-week period "due to the screen credit he had received." (91 F. (2d) 863, 867.)

Defendant motion picture corporation contended in that case, as defendants here contend, that "there is a lack of evidence to support the award of damages in that there was no standard by which damages could be gauged." (91 F. (2d) 863, at p. 866.) It is apparent from the dissenting opinion of Judge Wilbur that this Court fully considered the contention that "the evidence leaves the damages to be determined by the jury by guess and speculation." (91 F. (2d) 863, at p. 870.)

Judge Wilbur, in his dissenting opinion, stressed the fact that the plaintiff could not expect to recover "for loss of profits which he expected to acquire by reason of entering into other contracts which he claims to have been unable to do because of the breach of contract." (91 F. (2d) 870, 871.) Extreme emphasis is placed in the dissenting opinion upon the same cases upon which defendants rely in the case at bar, to wit, *Broadway Photoplay Company v. World Film Corporation*, 225 N. Y. 104, 121 N. E. 756 (cited by defendant Universal, Op. Br. p. 54); *Bernstein v. Meech*, 130 N. Y. 354, 29 N. E. 255 (cited and quoted by defendant Universal, Op. Br. p. 55).

Judge Wilbur expressly stated in his dissenting opinion that "it is clear it would be impossible to measure the value of one story by the amount paid for an entirely different story, even though the author is the same. There

is no basis for comparison, and to permit the jury to determine the value of one play with or without screen credit by evidence of the value of another and entirely dissimilar play would evidently require the jury to enter the domain of speculation.” (91 F. (2d) at p. 870.)

Nevertheless, the majority of this Court upheld the contentions of the plaintiff that “*uncertainty as to the measure or extent of damages is not a defense and that the true rule on uncertainty of damages is that the prohibition is directed against uncertainty as to cause rather than uncertainty as to measure or extent*”; the Court stating at 91 F. (2d) 866: “We do not believe the evidence is subject to a charge of uncertainty.”

It is respectfully submitted that in the case at bar the evidence clearly shows that the plaintiff suffered substantial damage. The fact that plaintiff could not show in exact dollars and cents to what extent he was damaged is immaterial under all of the authorities. Particularly is this true where uncertainty in the amount of damage has been due to *deliberate* misappropriation of plaintiff's property.

In *Sheldon v. Metro-Goldwyn Pictures Corporation*, 106 F. (2d) 45, at page 50, the Second Circuit Court of Appeals refers to the fact that “defendants were not innocent offenders; they deliberately lifted the play,” and stated at page 51:

“In cases where plaintiffs failed to prove their damages exactly, we often make the best estimate

we can even though it is really no more than a guess (Piessonka v. Paramount Company, 2nd Circuit, 102 Fed. (2d) 432, 434), and under the guise of resolving all facts against the defendants we will not deny the one fact that stands undoubted. Procedural duties are devised in aid of truth and their supporting use may defeat their whole purpose, as here it would. . . . We must make an award which by no possibility shall be too small. It is not our best guess that must prevail but a figure which will favor the plaintiffs in every reasonable chance of error.”

Likewise in *Bigelow v. RKO Radio Pictures, Inc.*, 66 S. Ct. Rep. 574, 90 L. Ed. 570 (cited by defendant Universal, Op. Br. p. 61), the United States Supreme Court stated in a portion of the opinion which defendant Universal omits from the center of its quotation (66 S. Ct. Rep. at p. 580):

“Any other rule would enable the wrongdoer to profit by his wrongdoing at the expense of his victim. It would be an inducement to make wrongdoing so effective and complete in every case as to preclude any recovery, by rendering the measure of damages uncertain. Failure to apply it would mean that the more grievous the wrong done, the less likelihood there would be of a recovery.

“The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created. See *Package Closure Corp. v. Sealright Co.*, 2 Cir., 141 F. 2d 972, 979.

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“The constant tendency of the courts is to find some way in which damages can be awarded where a wrong has been done. Difficulty of ascertainment is no longer confused with right of recovery’ for a proven invasion of the plaintiff’s rights. *Story Parchment Co. v. Patterson Parchment Paper Co.*, *supra*, 282 U. S. 565, 51 S. Ct. 251, 75 L. Ed. 544; and see also *Palmer v. Connecticut Railway Co.*, 311 U. S. 544, 559, 61 S. Ct. 379, 384, 85 L. Ed. 336, and cases cited.”

See also:

Gotham Silk Hosiery Company v. Artcraft Silk Hosiery, 147 F. (2d) 209;

American Law Institute Restatement of Torts, Sec. 912, Comment D;

American Law Institute Restatement of Contracts, Par. 33, Comment A;

Story Parchment Co. v. Paterson, 282 U. S. 555, 51 S. Ct. 248, 75 L. Ed. 544;

Dowajiac Manufacturing Company v. Minnesota Moline Plow Company, 235 U. S. 641, 35 S. Ct. 221, 59 L. Ed. 398;

Paramount Productions, Inc., v. Smith (9th Cir.), 91 F. (2d) 863, 866.

(B) IN PLAGIARISM CASES, AS WELL AS ALL OTHER CASES INVOLVING PERSONAL PROPERTY, COURTS HAVE FREQUENTLY AWARDED DAMAGES BASED ON THE PLAINTIFF'S OWN TESTIMONY OF THE VALUE OF THE PROPERTY MISAPPROPRIATED.

The general rule is well established—without conflict—that the owner of personal property may always testify as to its value.

See 22 *Corpus Juris* (Evidence), Section 863, and cases cited. This rule has been followed in the federal courts from early times!

Union Pac. R. Co. v. Lucas, 136 Fed. 374;

Chicago etc. R. Co. v. Ohio City Lbr. Co., 214 Fed. 751;

Baltimore American Ins. Co. v. Pecos Merc. Co., 122 F. (2d) 143;

Sacramento Sub. Fruit Lands Co. v. Soderman, 36 F. (2d) 934 (C. C. A. 9th).

Furthermore, the owner may testify to the value of personal property of an intangible nature such as (1) the value of an advertising scheme (*Brookins v. Natl. Ref. Co.*, 26 Ohio App. 546, 160 N. E. 97), and (2) the value of the good will of a business (*White v. Jones*, 79 App. Div. 373, 79 N. Y. Supp. 583; *Sturtevant v. Dowson*, 110 Ore. 155, 222 Pac. 294).

Literary property is "not distinguishable from any other personal property," it is "governed by the same rules" and "protected by the same process." (*Palmer v. Dewitt*, 47 N. Y. 532 at 538.)

The state courts of California and other states, and the federal courts as well, have applied the same rules to cases involving literary property which pertain to proof of damages in cases involving other forms of personal property.

In *Barsha v. Metro-Goldwyn-Mayer*, 32 Cal. App. (2d) 556, the record on appeal shows that the plaintiffs testified the value of their unpublished manuscript was \$10,000 before its misappropriation by Metro-Goldwyn-Mayer and was worthless afterwards. Defendants' "expert" witnesses testified to the contrary as in the present case. The jury rendered a verdict of \$10,000 predicated solely upon the plaintiff's testimony. The judgment was affirmed by the District Court of Appeal and hearing was denied by the Supreme Court.

In *Yadkoe v. Fields*, 66 Cal. App. (2d) 150, a verdict of \$8,000 was sustained for the misappropriation of a few "gags" in a single radio broadcast. The record on appeal shows that the plaintiffs testified the value of their material to have been \$20,000. The defendants contended upon appeal "that there is no evidence of the value of the use of respondent's material," but the Court said at page 160:

"The evidence of value was contained in the testimony of respondent. Sufficient evidence was presented on behalf of respondent for consideration by the jury of the issues raised by the pleadings: the evidence sustains the judgment."

In *Paramore v. Mack Sennett, Inc.*, 9 F. (2d) 66, the record on appeal reflects evidence by the plaintiff and other witnesses upon the subject of value. The Court said the amount of damage "cannot be determined with

any assurance that it is truly accurate.” Nevertheless, the Court gave plaintiff judgment for \$2,500 for the unauthorized use of a copyrighted poem.

In *Nathan v. King Features Syndicate*, 32 N. Y. Supp. (2d) 519, the plaintiff was George Jean Nathan, a dramatic critic, who agreed to write a bi-weekly article for \$200 per article which was to be published in two daily newspapers, one in New York and one in Chicago. The article was syndicated and sold by the defendant to 12 additional newspapers. Nathan testified as to what he believed “a fair price for his articles” and “a fair price for syndicated articles.” Although with respect to the latter the Court stated that such a “method of approximation still leaves a wide margin between what a publisher can get for his completed product and what he can or will pay to authors,” nevertheless, the Court awarded \$4960 damages, stating at page 521:

“ . . . However labelled plaintiff’s right must be measured not by the benefit or profit to defendant, but by the loss to plaintiff. What that loss is, is far from satisfactorily shown by the evidence, but uncertainty as to the amount is not a ground for refusing any relief at all. *Wakeman v. Wheeler & Wilson Mfg. Co.*, 101 N. Y. 205, 209, 4 N. E. 264, 54 Am. Rep. 676; *Industrial & General Trust Ltd. v. Tod*, 180 N. Y. 215, 73 N. E. 7; *Acunto v. Schmidt-Dauber Co.*, 207 App. Div. 411, 202 N. Y. S. 1; *MacGregor v. Watts*, 254 App. Div. 904, 5 N. Y. S. 2d 525. The trier of the facts (in this case the court without a jury) must make the best approximation it can by considering all the circumstances in a rational and common sense way, even though the result is hardly more than a guess. *MacGregor v. Watts*,

supra; *Pieczonka v. Pullman Co.*, 2 Cir., 102 F. 2d 432, 434; *Sheldon v. Metro-Goldwyn-Mayer Pictures Corp.*, 2 Cir., 106 F. 2d 45, 51.”

In *Southern Express Co. v. Owens*, 146 Ala. 412, 41 So. 752, 8 L. R. A. (N. S.) 369, 119 Am. St. Rep. 41, 9 Ann. Cas. 1143, the plaintiff brought an action to recover the value of a literary manuscript which had taken three years to prepare and which had been lost by the defendant. Plaintiff testified that its value was \$1500. There was no other testimony on this point. A judgment for \$1500 in favor of the plaintiff was affirmed, the Court stating:

“Ordinarily, where property has a market value that can be shown, such value is the criterion by which actual damages for its destruction or loss may be fixed. But it may be that property destroyed or lost has no market value. In such state of the case, while it may be that no rule which will be absolutely certain to do justice between the parties can be laid down, it does not follow from this, nor is it the law, that the plaintiff must be turned out of court with nominal damages merely. Where the article or thing is so unusual in its character that market value cannot be predicated on it, its value, or plaintiff’s damages, must be ascertained in some other rational way, and from such elements as are attainable. . . .

“. . . The plaintiff in the case testified to the value, and his was the only evidence, and we have not been shown that the court erred in its finding as to the value.” (Pp. 755-756.)

In the instant case the testimony of Harold Lloyd as the president of the corporation owning the copyrighted

motion picture was further fortified by the fact that he was abundantly qualified as an expert in this field.

If the evidence of any owner—whether qualified or not—is admissible and competent, then certainly Lloyd's evidence is sufficient of itself to support the judgment and would have justified an award of damages far in excess of that given by the Trial Court. (See Cross-App. Op. Br. pp. 15-24.)

Contrary to defendant Universal's assertion (Op. Br. pp. 64-65) that "the Federal courts have recognized the impossibility of proving actual damages in an action of this nature,"* there are many cases where federal courts have awarded judgments for damages in copyright infringement or kindred matters predicated upon the plaintiff's own evidence.

See, in addition to the cases cited above:

Atlantic Monthly Company v. Post Publishing Company, 27 F. (2d) 556;

Paramount Productions v. Smith, 91 F. (2d) 863, 866 (Cert. Den. 302 U. S. 749, 58 S. Ct. 266, 82 L. Ed. 579);

Detective Comics, Inc., v. Bruns, 28 Fed. Supp. 399, affirmed in 111 F. (2d) 432 (C. C. A. 2).

*The five cases cited by appellant involved profits only; the U. S. Supreme Court stating in *Westermann v. Dispatch Printing Co.*, 249 U. S. 100, 103, 194, that there was "undisputed testimony to the effect that the damage could not be estimated"; and in *Douglas v. Cunningham*, 294 U. S. 207, 208, that "at the close of the trial the petitioners admitted inability to prove actual damages." Such decisions as these, where there was no proof of damage, and the plaintiff conceded inability to prove damage, do not establish a general rule of "impossibility of proving actual damages."

(C) A FORTIORI IS A JUDGMENT FOR DAMAGES SUPPORTED WHERE NOT ONLY THE OWNER OF THE PROPERTY MISAPPROPRIATED BUT FOUR EXPERT WITNESSES HAVE TESTIFIED THAT SUBSTANTIAL PROPERTY RIGHTS AND PRESENT EXISTING INTRINSIC PROPERTY VALUES HAVE BEEN IMPAIRED OR DESTROYED.

Although defendants have contended that expert opinion evidence is inadmissible to show the value of plaintiff's property, and have specified as error the admission of such testimony (Universal's Op. Br. p. 40), they have cited no cases to support their contention. In fact, they themselves used alleged experts in attempting to sustain their position that plaintiff's property had *no* value.

It has been the practice in the courts for many years to use expert witnesses in this type of case and such use is bottomed upon the fundamental and long settled rule that expert opinion testimony is always admissible to prove value of property. As pointed out in 20 *Am. Jur. (Evidence)*, Section 890, pages 747, 748:

"Opinion testimony is indispensable in determining the value of property, for it is evident that a court or jury can hardly determine the value of a house, a lot, a horse or any other property from even the most minute description of it. It is universally recognized that witnesses who are competent to give their opinions as to the value of property may do so when the value of property is an issue to be determined, including its value before and after the injury complained of."

See also 20 *Am. Jur. (Evidence)*, Section 894, pages 751, 752:

“It is universally acknowledged that opinion testimony of qualified witnesses is admissible to prove the value of personal property of all kinds, when such testimony is necessary for a fair determination of its value.”

It can hardly be contended that the instant case was not one where such testimony was peculiarly necessary. Certainly the Trial Court was not qualified to determine such values without extrinsic aid and it so expressly stated. [See Tr. pp. 300-303.] Such evidence has been admitted repeatedly by the courts in cases involving the value of personal property. (*McGowan v. American Pressed Tan Bark Co.*, 121 U. S. 575, 7 S. Ct. 1315, 30 L. Ed. 1027.) It has been applied in cases involving the value of patent and patent rights. (*General Paint Corp. v. Kramer*, 68 F. (2d) 623; *Standard Brands v. Federal Yeast Corp.*, 38 F. (2d) 314.) It has been admitted from earliest times in literary property cases. (*Babcock v. Raymond*, 2 Hilt. (N. Y.) 61.)

Such evidence is admissible to show change in value occasioned by injury. (*Sturm v. Williams Oven Mfg. Co.*, 201 App. Div. 113, 193 N. Y. Supp. 852; *Walker v. Graham*, 233 Ala. 539, 172 So. 655.) As stated by the Third Circuit Court of Appeals in *Gotham Silk Hosiery Company v. Artcraft Silk Hosiery Mills*, 147 F. (2d) 209, at p. 216:

“ . . . For many years courts have permitted the use of expert testimony to ascertain the amount of damages where documentary evidence is lacking.”

The four cases cited by Universal (Op. Br. p. 59) in opposition to this well-settled practice are easily distinguishable.

In *Rude v. Westcott*, 130 U. S. 152, cited by defendant Universal (Op. Br. p. 59) the so-called experts who testified were completely unqualified. In the opinion on the page immediately preceding that containing the portion quoted by Universal, appears the following language:

“One of the principal witnesses stated he had never read the patent, had never seen a drill made like that described, had no experience in the matter of licenses, and that he placed his estimate of the value of the claim patented at what he considered would be a fair recompense to the inventor” (at p. 166).

In the *Rude* case plaintiff's so-called experts were not such and obviously were unqualified to testify.

In *Fried, Krupp, Aktien-Gesellschaft v. Midvale Steel Co.*, 191 Fed. 588, the language quoted by defendant Universal (Op. Br. p. 59) had reference to the question of patent infringement as distinguished from damages. In that case plaintiff attempted to show infringement of its patent by expert opinion evidence in the face of witnesses who observed the process and testified as to what they saw and how the result was obtained. The actual facts testified to by eye-witnesses showed no infringement. *The question of damages was never discussed by the court.*

In *Chicago Life Ins. Co. v. Tiernan*, 263 Fed. 325, cited by defendant Universal (Op. Br. p. 59), the plaintiff brought an action for breach of a contract of employment. He had been employed by an insurance company.

The insurance company had been recently incorporated, was in poor financial condition, and had been the subject of notoriety because of a number of lawsuits arising out of improper management. In fact it had finally sold its assets to a third party which ceased conducting an insurance business. The language quoted by Universal in its brief (Op. Br. p. 59) had reference to alleged anticipated future profits of the defendant insurance company and was based upon alleged expert testimony concerning the rate of renewal of policies in sound, established companies—which the defendant was not.

Wakeman v. Wheeler & Wilson Mfg. Co., 101 N. Y. 205, likewise cited by Universal (Op. Br. p. 59) needs little comment. Its complete dissimilarity to the case at bar is found in the very language quoted by defendant Universal.

Universal's attempt to utilize these four cases to overcome the well established rules permitting expert testimony must fail.

In *Sheldon v. Metro-Goldwyn Pictures Corporation*, 106 F. (2d) 45, the court permitted expert testimony from both producers and exhibitors of motion pictures respecting the value of the copyrighted material misappropriated by the defendant picture corporation, and the Second Circuit Court of Appeals said with respect to such evidence (106 F. (2d) at p. 50):

“Men often make quantitative judgments and act upon them in matters which logically admit of them as little as this. If one says that he likes one kind of music twice as much as another, we do not charge him with talking nonsense. We should indeed do so, if he added that his liking for Wagner was ten percent of his liking for Beethoven; but even then

it would express, however pedantically, a different degree of preference from the first form, and it might well have different practical consequences. A court is justified in basing its decrees upon practices common in other human affairs."

In holding that the testimony of experts, even if only "estimates," were approximations entitled to weight and sufficient to sustain a judgment, the Second Circuit Court of Appeal stated (106 F. (2d) at p. 51):

"We are aware that out of all this no real standard emerges, and that it would be absurd to treat the estimates of the experts as being more than expressions of very decided opinions that the play should count for very little. But we are resolved to avoid the one certainly unjust course of giving the plaintiffs everything, because the defendants cannot with certainty compute their own share. In cases where plaintiffs fail to prove their damages exactly, we often make the best estimate we can, even though it is really no more than a guess (*Pieczonka v. Pullman Co.*, 2 Cir., 102 F. (2d) 432, 434), and under the guise of resolving all doubts against the defendants we will not deny the one fact stands undoubted. Procedural duties are devised in aid of truth; and their unsparing use may defeat their whole purpose, as here it would. However, though we do not press the burden of proof so far, the defendants must be content to accept much of the embarrassment resulting from mingling the plaintiffs' property with their own. We will not accept the experts' testimony at its face value; we must make an award which by no possibility shall be too small. It is not our best guess that must prevail, but a figure which will favor the plaintiffs in every reasonable chance of error."

This decision of the Second Circuit Court of Appeals was affirmed by the United States Supreme Court in *Sheldon, et al. v. Metro-Goldwyn Pictures Corporation, et al.*, 309 U. S. 390, 69 Supreme Court Reporter 68, where that Court commented upon the evidence of the experts and expressly held their evidence necessary and competent to prove the value of plaintiff's misappropriated literary and dramatic material, the Court stating, 309 U. S. 390, at p. 408:

“By virtue of an extensive experience, they had an intimate knowledge of all pertinent facts relating to the production and exhibition of motion pictures. Nor can we say that the testimony afforded no basis for a finding. What we said in the *Dowagiac* case is equally true here—that what is required is not mathematical exactness but only a reasonable approximation. That, after all, is a matter of judgment and the testimony of those who are informed by observation and experience may be not only helpful but, as we have said, may be indispensable . . . We see no greater difficulty in the admission and use of expert testimony in such a case than in the countless cases involving values of property rights in which such testimony often forms the sole basis for decision.”

The evidence is uncontradicted that the plaintiff's motion picture “*Movie Crazy*” had been an outstanding success throughout the world and had realized more than \$400,000 profits at the bottom of a world depression. Where a literary or dramatic property has acquired world-wide success, it has developed inherent and intrinsic value which is neither “speculative” nor “conjectural” nor contingent upon possible future profits; but such present

value is based upon its past performances, its previous profits earned, its wide-spread popularity and favorable reputation. In these respects it differs not at all from any other form of real or personal property. Any buyer or seller of any type of property will consider potential future profit as one of the elements entering into the transaction, and any buyer, owner or seller is naturally concerned with what a property will return from sale or use.

As pointed out in *Agency of Canadian Car & Foundry Co. v. Penn Iron Works Co.*, 256 Fed. 339, even market value of property (where property has a market value) is based upon elements of cost plus a reasonable profit, and sound economic logic substantiates such a holding.

It is quite true that expert Botsford testified that Paramount would not reissue a picture unless it could make \$100,000 profit [Tr. p. 462] and when Lloyd was called as defendant Universal's own expert witness (see Point IV, *post*, pages 93 to 98) he testified that if he remade "Movie Crazy" he might make a profit of \$400,000 or \$500,000. Neither of plaintiff's experts Landau or Bentel estimated profits in any amount from either reissue or remake of plaintiff's picture and there is nothing in the evidence of these witnesses—and little in the evidence of Botsford and Lloyd—to justify appellant Universal's repeated implications that *all* of the testimony of all of plaintiff's experts was wholly predicated upon speculations and conjectures as to future profits and not at all upon the past performances, past profits, proven comedy values, and world-wide reputation and popularity of plaintiff's copyright. "By virtue of the extensive experience" of plaintiff's four expert witnesses, their testimony as busi-

ness men well informed as to values placed by the motion picture industry upon its own properties, may not have absolute "mathematical exactness" but certainly constitutes "a reasonable approximation" which is all that is required. (*Sheldon, et al. v. Metro-Goldwyn Pictures Corp., et al.*, 309 U. S. 390, 408.

(D) DEFENDANT'S CASES RESPECTING MARKET VALUE ARE NOT IN POINT. INTRINSIC VALUE OF PROPERTY MAY ALWAYS BE SHOWN WHERE MARKET VALUE DOES NOT EXIST.

We have no quarrel with the rules set forth in *Musser v. Magone*, 155 U. S. 240, concerning the definition of market value. The *Musser* case was not concerned with whether or not the personal property in question had a market value—that was conceded. The sole question was what that market value was, the case involving importations of foreign goods.

Walter v. Duffy, 287 Fed. 41, likewise cited by defendant Universal (Op. Br. p. 62), clearly points out the long and well established rule which hereafter will be referred to, that where there is no market value as evidenced by sales, evidence of intrinsic value of property is always admissible.

In the *Walter* case involving income tax, the sole question was "what was the fair market price or value" of shares of stock in an insurance company? There had been a few actual sales on the open market but the evidence showed that such sales had been brought about through haggling and bargaining. The court stated in discussing this question:

"Evidence of intrinsic value is not resorted to when fair market value is evidenced by sales. But

the difficulty here is not with the principle, as stated in the charge, but with its application to the peculiar facts of this case." (At p. 44.)

The court further clearly pointed out that where no market price exists, resort must be had to "fair value" of the property involved.

In reversing the judgment on an appeal by the tax payer, the court said:

"It was error not to admit proof of the circumstances under which the sales were made and evidence tending to establish the *intrinsic value* of the stock." (At p. 48.)

The well settled rule with respect to determining damages for injury or destruction of personal property is set forth in 15 Am. Jur. (Damages), Sec. 122, pp. 530-531, where the authors point out that generally, value of personal property is based on market value but where there is no market value in its legal sense, recovery is based on its actual value or as in the case of unique properties, upon its value to the owner. In the latter case the rule is stated as follows in 15 Am. Jur. (Damages), Sec. 125, pp. 534-535:

"The fact that personal property which is injured or destroyed by the wrongful or negligent act of another, has no market value, does not restrict the recovery to nominal damages only; its value or the plaintiff's damages must be ascertained in some other rational way and from such elements as are attainable. In such case the proper measure of damages is generally its actual value or its value to the owner. The value of an article may be shown by proof of such elements or facts as may exist—such as its cost,

the cost of reproducing or replacing it, its utility and use . . .”

No better illustration of the use of these rules is available than *Sinclair Ref. Co. v. Jenkins*, 289 U. S. 689 (previously cited) where the court said:

“This is not a case where the recovery can be measured at the current price of a market. The patent is a thing unique. There can be no contemporaneous sale to express the market value of an invention that derives from its novelty, its patentable quality. (Citations.) But the absence of market value does not mean that the offender shall go quit of liability altogether. The law will make the best appraisal that it can, summoning to its service whatever aid it can command. (Citations.) At times the only evidence available may be that supplied by testimony of experts . . .”

And again at page 699:

“Formulas of measurement declared *alio intuitu* may be misleading if wrested from their setting and applied to new conditions. (See e. g., *Standard Oil Co. v. So. Pac. Co.*, 268 U. S. 146, 155:

“The market test failing, there must be reference to the values inherent in the thing itself, whether for use or for exchange (*Industrial Gen. & Trust Co. v. Tod*, *supra*).”

In *Standard Oil Co. v. So. Pac. Co.*, 268 U. S. 146, 45 S. Ct. 465, 69 L. Ed. 890, cited with approval in *Sinclair Ref Co. v. Jenkins*, the Supreme Court recognized the well established rule, stating:

“Where there is no market value such as is established by contemporaneous sale of like property in

the way of ordinary business, as in the case of merchandise bought and sold in the market, other evidence is resorted to. The value of the vessel lost properly may be taken to be the sum which, considering all the circumstances, probably could have been obtained for her on the date of the collision . . . The ascertainment of value is not controlled by artificial rules. It is not a matter of formulas, but there must be a reasonable judgment having its basis in a proper consideration of all relevant facts" (pp. 155-156).

In the *Standard Oil Co.* case expert opinion evidence was admitted to show value of the property in question.

In *Agency of Canadian Car & Foundry Co. v. Penn. Iron Works Co.*, 256 Fed. 339, the court was dealing with the question of the value of unfinished shrapnel shells. It pointed out that the owner was entitled to the value of the shells and that this value of necessity was based upon the cost to produce plus a fair profit and that the value of a commodity having a market value includes profit as well as cost. It further expressly held that where, as there, no market value was available, still the plaintiff was not restricted to nominal damages.

See, also:

Weed v. Lyons Pet., 294 Fed. 725, aff'd 300 Fed. 1005;

Austin v. Millsbaugh & Co., 90 Miss. 354, 43 So. 305.

In *Jacksonville T. & K. W. Ry. Co. v. Peninsular Land etc. Co.*, 27 Fla. 1, 57, 9 So. 661, 689, the action involved the loss of real and personal property and the question of the extent of plaintiff's damages was involved.

In answer to a contention similar to that advanced by the defendants here, the court said:

“We think it would have been a very harsh rule in a case like this to have confined the plaintiff to proof of the market value . . . In the absence of proof that . . . there was a market value for such property.” (At p. 680 of 9 So.)

The court clearly pointed out that where the property in question had no market value in its legal sense, plaintiff was entitled to prove its value “and to establish value in such cases the opinions of witnesses acquainted with the standard of value of such properties are properly admissible” (at p. 680).

And again:

“Property may have a value for which the owner may recover if it be destroyed although it have no market value” (at p. 684).

These well established rules have been followed in this circuit. (*Feather River Lbr. Co. v. U. S.*, 30 F. (2d) 642 (C. C. A. 9.)

(E) APPELLANTS ERR IN CONTENDING THAT THE DAMAGES FOUND BY THE COURT TO HAVE BEEN SUFFERED BY PLAINTIFF FROM UNIVERSAL'S INFRINGEMENTS WERE RENDERED UNCERTAIN BY REASON OF COLUMBIA'S INFRINGEMENTS.

The trial court expressly found

“that by reason of said infringements by defendants and each of them upon plaintiff's copyright the court finds that plaintiff has been damaged by defendants and each of them in the sum of \$40,000” [Par IX, Tr. p. 35].

Appellant Bruckman states that the foregoing finding “must fall because it cannot be ascertained from the record whether the damage, if any, resulted from Universal's photoplay ‘So's Your Uncle’ or from Columbia's picture ‘Loco Boy Makes Good’ ” (Bruckman's Op. Br. p. 68). Appellant Universal states that

“the court failed to find the extent to which the use of the same material in the Columbia picture damaged plaintiff.” (Universal Op. Br. p. 70.)

Both appellants ignore the fact that the finding of \$40,000 is expressly restricted to the infringements by defendant Universal and defendant Bruckman in the Universal picture “So's Your Uncle.” Each and all of plaintiff's witnesses testified in substance that the Columbia “short” had not affected the value of plaintiff's “feature” motion picture because the pictures were not of the same class or character. Most of plaintiff's witnesses were asked upon *cross-examination* by the defendants or the court as to the damage done by Columbia and their answers were in accord that such damage was nil or

negligible. [Lloyd, Tr. p. 156; Landau, Tr. pp. 400, 404, 405; Bentel, Tr. pp. 409, 410; Botsford, Tr. pp. 464, 465.]*

Arthur Landau testified there was a custom and practice in the moving picture industry to require exhibitors to purchase bad comedy shorts in order to secure good feature pictures from the same producing company but that exhibitors frequently did not show the two-reel comedies for evening performances either because they were bad or for other reasons. [Tr. pp. 402-405.]

On the other hand the defendants offered no evidence that the damages found by the court to have been suffered by plaintiff from Universal's infringements were due in fact to Columbia's infringements. In fact the defendants took the position that plaintiff had not been damaged by

*Lloyd testified [Tr. pp. 374, 375]:

" . . . My opinion is that a short does not compete with a feature picture. In the first place, a great many times shorts are purchased by the theatres but are not always shown. Many, many times—a great many times in the evening they haven't time to show them. Sometimes they are purchased and never show them. Another thing, in this particular short the comedy is done so broadly and so unbelievably bad and it is in such a hodge-podge of comedy sequence that I cannot possibly see how that could do anything but very minor damage and certainly not keep us from remaking or reissuing a picture.

Q. In your opinion, then, the circulation of the Columbia short during the years 1942 and 1943 did not impair the value of the reissue rights or remake rights of your motion picture, is that correct? A. That is correct."

either Columbia *or* Universal's infringements because plaintiff had no property of any value at all.

The whole point about the lack of a specific finding as to the exact amount of damage done by Columbia is just another "red herring." No such issue was raised by the pleadings and no such finding is required except in an action between Columbia and Lloyd.

In the instant action, the court gave the defendants the benefit of every doubt when it stated that the evidence respecting Columbia's infringements had "minimized the actual damage," sustained through the Universal infringements. [Tr. p. 521.] Defendants are hardly in a position to now complain that had it not been for Columbia's infringements, the court would unquestionably have found the damages sustained by plaintiff through Universal's infringements to have been much more than \$40,000.

We point out that in the instant case four experts testified plaintiff's damage resulted from Universal's infringements and *no witness testified to the contrary*.

Courts have heretofore commented upon an attempt by defendants, as in the instant case, to invoke another's wrongdoing as a defense, but to no avail. (See *Great A. & P. Tea Co. v. A. & P. Radio Stores*, 20 Fed Supp. 703 at 706.)

(F) DEFENDANTS ERR IN CONTENDING THAT PLAINTIFF'S ACTUAL DAMAGES "SHOULD NOT EXCEED THE SUM OF \$5,000." IT IS UNTRUE THAT DEFENDANT UNIVERSAL "ESTABLISHED THAT IT WAS NOT AWARE THAT IT WAS INFRINGING" AND THAT ITS INFRINGEMENTS "COULD NOT HAVE BEEN REASONABLY FORESEEN." DEFENDANT UNIVERSAL IS FULLY CHARGEABLE WITH KNOWLEDGE AND NOTICE OF MATTERS KNOWN TO ITS AGENTS AND EMPLOYEES WHILE ACTING WITHIN THE COURSE AND SCOPE OF THEIR AGENCY AND EMPLOYMENT.

Appellant Universal contends that plaintiff's actual damages "should not exceed the sum of \$5,000" because defendant Universal "established that it was not aware that it was infringing and that such infringement could not have been reasonably foreseen." (Op. Br. p. 66.)

Appellant Universal deliberately omits to direct the attention of this court to the fact that the trial court *expressly* found contrary to this contention. See Finding VIII, [Tr. p. 35], where the Trial Court expressly found:

" . . . that defendants and each of them at all times were fully informed and had full knowledge that they were infringing upon plaintiff's copyright and the court further finds that the defendant Universal Pictures Company, Inc. could and should have reasonably foreseen said infringements upon plaintiff's copyright."

This finding is abundantly supported by the uncontradicted evidence that at all times during the production of the infringing motion picture Universal's writer Bruckman and Universal's producer Yarbrough were fully informed and had full knowledge that the infringing sequence was "suggested by and patterned after" the Harold Lloyd picture "Movie Crazy." [Tr. pp. 95-96.] In view of this evidence appellant Universal is completely in error in claiming that it "established that it was not aware it was infringing and that such infringement could not have been reasonably foreseen." (Br. p. 66.) Defendant Universal is fully chargeable with knowledge and notice of matters known to its agents and employees while acting within the course and scope of their agency and employment (*Fletcher Cyclopedic of the Law of Private Corporations*, Vol. 4, Chap. 42, Par. 2215, p. 3430; *Christian v. American Druggist Syndicate*, 285 Fed. 359 (C. C. A. 2); *Simmons Creek Coal Co. v. Doran*, 142 U. S. 417, 12 S. Ct. 239, 35 L. Ed. 1063; *Curtis Co v. U. S.* 262 U. S. 215, 222, 43 S. Ct. 570, 67 L. Ed 956; *Schneider v. Thompson*, 58 F. (2d) 94, 96; *Shapiro & Bernstein Co. v. Velten*, 47 Fed. Supp. 648; *Sheldon v. Metro-Goldwyn Pictures Corp., et al.*, 106 F. (2d) 45, 50, 309 U. S. 390, 397.)

The section of the Copyright Act quoted by appellant Universal (Br. p. 66) omits the first portion of Section 25(b) which provides no limitation whatever upon the amount of actual damages "as well as" actual profits re-

sulting from the infringement, but is very plain in its requirements that an infringer shall be liable:

“(b) To pay to the copyright proprietor such damages as the copyright proprietor may have suffered due to the infringement as well as all the profits which the infringer shall have made from such infringement . . .”

The statute then further provides for the award of so-called statutory damages which may be awarded by the court “in lieu of actual damages and profits”; which *statutory* damages are subject to the limitation of \$5,000 *only* “where the infringer shall show that he was not aware that he was infringing and that such infringement could not have been reasonably foreseen.” This limitation is applicable, however, only where each and all of the following elements are present:

1. Where no actual damages or profits have been proven; and
2. Where the infringer proves that he was “not aware that he was infringing a copyright work”; and
3. Where the infringer proves that “such infringement could not have been reasonably foreseen.”

None of these elements are present in the case at bar and the trial court expressly found that the defendants were fully aware and had “full knowledge” that they were infringing upon plaintiff’s copyright and that defendant Universal “should have reasonably foreseen said infringements.” [Tr. p. 35.]

POINT IV.

The Court Did Not Err in Sustaining Objections to Improper and Argumentative Questions Asked Lloyd and Incompetent Questions Asked Hirli-man.

(A) The Court Properly Sustained Objections to Argumentative and Improper Questions Propounded by Defendants to Harold Lloyd Whom They Called as Their Own Expert Witness and Stipulated They Would be Bound By His Testimony.

Appellant Universal claims error by the Trial Court in excluding testimony purporting to impeach Harold Lloyd whom defendants had called as their own witness. (Br. p. 69.) As usual, defendant Universal distorts by failing to state the actual picture of what happened at the trial.

On Sept. 13, 1945, defendants rested on the issue of liability. [Tr. p. 340.] The Court agreed to permit certain additional evidence consisting of "not more than two experts" to testify at a subsequent date on the issue of damages. [Tr. p. 345.] When the case was called two months later, Nov. 16, 1945, the defendant Universal called Harold Lloyd "as a witness by and on behalf of the defendants." [Tr. p. 350.] Lloyd was expressly called as the "*defendant's* expert witness, not the plaintiff's, and *defendant's* counsel *stipulated* that Lloyd was their witness and that they would be bound by his testimony:

"The Court: With that assurance I am going to let you proceed with the question but *it is understood that this witness* is your witness and *you* will be bound by his testimony.

Mr. Abeles: *That is correct, sir.*" [Tr. p. 352.]

Subsequently when defendant's counsel did not like Lloyd's testimony as to the high value of reissue rights of his "silent" pictures such as "GRANDMA'S BOY" and "GIRL SHY" (if revamped, narrated and scored like Charlie Chaplin's "GOLD RUSH") and his later "talking" motion pictures such as "MILKY WAY" and "MOVIE CRAZY," Universal's counsel, Mr. Abeles, decided he did not wish to be bound by his previous stipulation and the following colloquy took place:

"Mr. Abeles: I respectfully submit he is not my witness.

The Court: Yes, he is. You called him as your witness. He was excused and I told you this case was continued for a specific purpose, that is, to hear two experts on each side, and you issued a subpoena for this man and brought him into court. I told you in my chambers this morning that I would permit you to use him only as your own witness and when you called him you called him as your own witness."
[Tr. p. 366.]

When defendant Universal claims error on the part of the Trial Court in refusing to permit them to impeach a witness called by them as their own witness under the circumstances disclosed by the record and under a *stipulation* that they would be bound by his testimony, we submit they are wilfully and deliberately attempting to confuse the issue and avoid the consequences of their own conduct.

Strangely enough, in *Harold Lloyd Corporation v. Witwer*, 65 F. (2d) 1, so strongly relied upon by both appellants, virtually the same situation arose when Harold Lloyd and other officers of the Harold Lloyd Corporation

were called by the adverse party who claimed a right to impeach these witnesses whom they had called as their own. In no uncertain terms this Court said, 65 F. (2d) at p. 5:

“The fact that the appellee may have called these witnesses under a mistaken belief . . . cannot change the rule that appellee thereby vouched for their credibility.”

This Court expressly held that under the circumstances disclosed, the adverse party was “estopped to claim that the witnesses are unworthy of credit by reason of having called them as his own witnesses.” (65 F. (2d) at p. 5.)

Furthermore the two questions which defendant’s counsel asked Lloyd were both highly improper, even if they had *not* called him as their own witness. The first question was highly argumentative and was objected to upon that ground and the objection sustained. [Tr. p. 364.] The witness had testified that comedies such as Chaplin’s “GOLD RUSH” had been reissued and could be remade and whether or not other comedies had been reissued or remade was “beside the point.” Counsel for defendant then indignantly commenced his argument with the witness:

“Q. That is beside the point? Well, in all these years if one single picture has ever been remade of that nature, that is beside the point, is that right?”

Mr. Fendler: Objected to as argumentative.

The Court: Yes, it is argumentative, counsel. I am not going to permit you to impeach your own witness as you go along.” [Tr. p. 364.]

The second question which the Court refused to permit defendant's counsel to ask was one concerning a *statement in a brief* in an action brought against Lloyd by Sadie Witwer (misprinted Witworth) fifteen years previously. [See Tr. p. 365.] Obviously a brief prepared by an attorney in another lawsuit tried fifteen years earlier was incompetent and completely beyond the limited scope of examination to which defendant's counsel had restricted himself by his agreement to be bound by Lloyd's testimony. [Tr. p. 352.]

It should furthermore be noted that the question was in effect merely another argument with the witness and defendant's counsel had previously been repeatedly cautioned by the Court against twisting the witness's answers [Tr. p. 361]; invading the province of the Court [Tr. p. 360]; and arguing with the witness [Tr. p. 358].

(B) The Court Properly Excluded Hirliman's Proposed Testimony That Thirteen Years Prior to Trial, He Had Personally Purchased Reissue Rights in an Old SILENT Lloyd Picture Entitled "GIRL SHY." Such Testimony Was Incompetent for All Purposes; It Did Not Contradict Lloyd, and It Could Not Establish the Value of Reissue Rights in a TALKING picture in 1945.

Defendant Universal complains that it was not permitted to offer evidence through its witness Hirliman "that he had purchased the reissue rights to one of plaintiff's pictures for only \$3500." (Universal's Op. Br. p. 70.) What Universal fails to state to the Court at any of the three places where the same statement appears in its brief (Universal's Op. Br. pp. 30, 31, 70) is that the motion picture in question was not a *talking* picture but was a *silent* picture, the reissue rights of which Hirliman

purchased "in either 1932 or 1933" [Tr. p. 429] long after the advent of talking pictures. Of course no ordinary exhibitor of talking pictures would purchase or accept silent pictures after his theater had once been "wired for sound" and the public had finally accepted talking pictures in place of silent pictures. Lloyd himself pointed out the necessity of revamping any silent picture in order to make it marketable.

"Naturally you have to embellish it today. You would have to narrate it to a certain extent. You would have to score it. That would naturally depend on how well you did that and who did it. I think I could do it and it would probably be very valuable.

Q. And would the same apply to the picture 'Safety Last'? A. I would say it would, yes." [Tr. p. 352.]

It is obvious that appellant Universal is attempting to take a very unfair advantage of its own concealment of material facts, when it contends that Hirliman's proposed testimony that he paid a third party (Pathe Exchange) \$3500 for the reissue rights of a *silent* motion picture in 1932, was relevant or competent or could have any probative force in a determination as to whether a *talking* motion picture had reissue value in 1945 (in which no revamping, narrating or scoring would be necessary).

Furthermore defendant Universal had contended from the commencement of the trial that the value of other *talking* pictures reissued and remade by other producers (particularly including the Harold Lloyd talking motion picture entitled "MOVIE CRAZY") was improper and incompetent and objections by defendants had been repeatedly sustained by the Court. [Tr. pp. 107-111.] In

other words, defendant Universal contends that one rule of evidence should be applicable to the plaintiff and all plaintiff's evidence respecting the 1945 value of comparable talking pictures should be excluded; but another rule of evidence should be applicable to the defendant Universal which should be permitted to offer evidence respecting the value of an incomparable silent picture purchased thirteen years prior to trial.

Appellant Universal's only other contention with respect to the admissibility of Hirlihan's evidence is that it was "in contradiction of Lloyd's prior testimony." (App. Universal's Op. Br. p. 70.) This also is a complete misstatement of the record and is based upon the additional flat misstatement that "Lloyd had testified that the reissue rights had never been sold, licensed or disposed of to any of his pictures." (Universal's Op. Br. p. 29.) The fact is that Lloyd testified "I haven't had them up for sale" [Tr. p. 354] but *Paramount* sold the remake rights of "'MILKY WAY' to Goldwyn" [Tr. p. 136], and Hirlihan's offered testimony was that he had purchased the remake rights in the silent picture "GIRL SHY" from Pathe [Tr. p. 429]. There is no inconsistency in Lloyd's testimony. Even if Lloyd's testimony was inconsistent it would be on a wholly collateral matter, to-wit: the value of reissue rights in *silent* pictures is not an issue in this lawsuit.

And in any event appellant Universal is precluded from attacking or attempting to impeach the witness whom they called and stipulated they would be bound by his testimony. See Point IV (A), *supra*: *Harold Lloyd Corporation v. Witwer*, 65 F. (2d) 1, at p. 5, is conclusive against defendants on this point.)

POINT V.

Defendant Universal's Attempt to Invoke the Doctrines of Laches and Estoppel for the First Time on Appeal Must Fail.

(A) The Evidence Shows No Laches and in No Event Is the Doctrine Applicable to an Action at Law for Damages.

Defendant Universal's attempt to shield itself from its intentional infringement of plaintiff's copyright by taking purported shelter under the doctrine of laches, is typical of its continuous efforts to avoid the effect of its wilful acts by raising completely untenable contentions.

The alleged defense of laches was never pleaded by defendants; it was not an issue in the Trial Court; and it is now being raised for the first time on appeal.

It is, of course, elementary that laches, like the statute of limitations, is an affirmative defense that must be alleged and proved by the defendants, and this is conceded. (Universal's Op. Br. p. 77.)

It is furthermore well established that such defense cannot be raised for the first time on appeal.

Ferryboatman's Union of Calif. v. Northwestern Pac. R. Co., 84 F. (2d) 773 (C. C. A. 9);

Ashton v. Glaze, 95 F. (2d) 427 (C. C. A. 9).

The cases relied upon by defendant Universal are not in point. For example, it cites the equity case of *Haas v. Leo Feist, Inc.*, 234 Fed. 105, but fails to comment upon or inform this Court of Judge Learned Hand's true

opinion on laches, for immediately following the language quoted by defendant Universal, the Court said:

“If the defendant be a *deliberate* pirate this consideration (laches) might be irrelevant and I think it such. . . .” (at p. 108.)

The other cases cited by defendant Universal are so completely inapplicable as to hardly merit comment. However, as an aid to this Court, we briefly refer to some of them.

Window Glass Mac. Co. v. Pittsburgh Plate Glass Co., 284 Fed. 645 (Universal’s Op. Br. p. 72) was an action *in equity* for patent infringement. Plaintiff, after threatening defendant with an action, *delayed eleven years in filing its suit*, during which time the defendant, relying on plaintiff’s apparent approval, made large expenditures. The very headnote of this case recognized the general rule, for it states:

“Mere delay will not ordinarily bar a suit for an injunction against a naked infringer. . . .”

Gillons v. Shell Co. of California, 86 F. (2d) 600 (Universal’s Op. Br. p. 73), likewise was an action *in equity* for patent infringement, where plaintiff *delayed for nine years* before bringing suit, although he had notice of defendant’s alleged infringement. Here there was actual proved prejudice to the defendant.

Hardt v. Heidweyer, 152 U. S. 547, was a creditor’s suit *in equity* where plaintiff delayed for over *five years*

before bringing suit after full knowledge of all of the facts.

Rome Grader & Mfg. Corp. v. J. D. Adams Mfg. Co., 135 F. (2d) 617, was an action *in equity* for patent infringement where the plaintiff waited *nine years* before bringing suit and where there would have been actual prejudice to the defendant had plaintiff's action been maintainable.

Preston v. Kaw Pipe Line Co., 113 F. (2d) 311, was an action *in equity* to secure a portion of the profits from an oil lease where the plaintiff had *waited fourteen years* before bringing his action, after sitting back and waiting to see whether operations would be financially successful.

Valvoline Oil Co. v. Havoline Oil Co., 211 Fed. 189 (Universal's Op. Br. p. 74), was an *equitable* action involving unfair competition and alleged trademark violation where plaintiff knew of defendant's actions many years before bringing suit, during which time defendant had expended large sums of money without objection on the part of plaintiff.

Vacuum Cleaner Co. v. Innovation Elec. Co., Inc., 234 Fed. 942, was an action *in equity* for alleged patent infringement. There was a five year delay, during which time plaintiff allowed the defendant to believe that no action would be taken. In this case a decree for the plaintiff was entered, the Court merely excluding the five year period from an accounting for profits.

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Pollitzer v. Foster, 59 F. (2d) 901 (Universal's Op. Br. p. 75), involved an action *in equity* for alleged patent infringement. Here plaintiff waited *five years* after abandoning a prior suit before filing his action and then *delayed an additional eleven years* before bringing the case to trial.

No additional comment is needed to point out the complete inapplicability of defendants' cases to the case at bar, where the uncontradicted evidence is that defendants deliberately misappropriated plaintiff's copyrighted material and plaintiff's attorney was instructed to give written notice of infringement "not very long" after Lloyd's attention was first directed to the infringements. [Tr. p. 153; Ex. G, Tr. pp. 386, 387.] Laches was neither pleaded nor proven and in an action at law for damages, has no application whatsoever; it is a defense only in an equitable proceeding when affirmatively pleaded and proven. (19 *Am. Jur.* (Equity), Sec. 489, *et seq.*)

(B) No Issue of Equitable Estoppel Was Presented in the Trial Court or Is Substantiated by the Record.

As usual, Universal's counsel completely distort and flatly misstate the record in their opening brief at page 77 when they state that the written notice of infringement [Defendant's Ex. G, Tr. pp. 386, 387] "was offered to establish an estoppel and was received in evidence for such purpose without objection."

For the first time upon this appeal we are now advised that the purpose for which our notice of infringement was

offered by defendants was “to establish an estoppel.” Such purpose was not disclosed in any way at the trial; an estoppel had not been pleaded by defendants, and in fact defendant Universal’s answer not only admitted it had received the written notice of infringement dated March 20, 1945, but furthermore admitted that since the receipt of such written notice “defendant has continued with the distribution and exhibition of said motion picture photoplay.” [Tr. p. 20, par. II.] It is quite true that plaintiff did not object to this pleaded notice being received in evidence. There was no contention by anyone that it had not been sent or that it had not been received or that it was anything else than what it purported to be, to wit: “the first written communication from the plaintiff’s attorney.” [Tr. p. 385.] Plaintiff’s counsel refused to stipulate that this letter was “the first notice of any claim” [Tr. p. 385] because defendants were at all times on notice that they were misappropriating plaintiff’s property. Obviously no estoppel can be predicated upon facts known to the defendants and unknown to the plaintiff.

The cases cited by defendant Universal are completely dissimilar.

In *Haskins v. Rosenberg*, 119 F. (2d) 803 (Universal’s Op. Br. p. 77), the action was in equity to quiet title to real property. The defendant’s answer specifically alleged laches as a defense and the only question before the Court was whether such a defense was broad enough to cover a Nevada statute of limitations where such statute

and its application had been argued in the Trial Court and was considered by all parties in issue.

Vernon Lbr. Corp. v. Harcen Const. Co., 155 F. (2d) 348 (Universal's Op. Br. p. 78), also involves a situation where the issue was expressly litigated in the Trial Court, and where the Court said that counsel "admitted during the trial that it (defense of waiver) was one of the major defenses to the counter-claim." (At p. 349.)

In *Pearl Assur. Co. Ltd. v. First Liberty Natl. Bank*, 140 F. (2d) 200 (likewise relied upon by Universal), the Court said:

"It is clear that one of the issues upon which the case was tried was whether or not there had been a waiver by the defendant of the provisions of the policy. . . . The question of waiver was definitely an issue in the trial of this case, in which evidence was introduced on both sides." (At p. 202.)

In the instant case, neither laches nor estoppel were pleaded nor proven and the statement that the plaintiff's notice of infringement was received in evidence "to establish an estoppel" or that the issue of estoppel "developed upon the trial" and in accordance with the stipulation of plaintiff's counsel, is a complete distortion of the record and is wholly untrue.

POINT VI.

Appellant Bruckman Is a Joint Tort Feasor Jointly Liable as a Contributory Infringer for All Damages Sustained Through Infringement Upon Plaintiff's Copyright.

Appellant Bruckman cites no cases which support his contention that he is not liable for damages as a contributory infringer. (Bruckman Op. Br. pp. 61-62.) *Washingtonian Pub. Co. v. Pearson*, 140 F. (2d) 465, cited by Bruckman, relates solely to the proposition that one infringer cannot be held responsible for profits collected by another infringer. Certainly in view of the uncontradicted evidence in this case appellant Bruckman cannot contend that he is "in no way connected with or responsible for . . . the infringements."

The finding of the Trial Court was that the individual defendant Clyde Bruckman was employed by the defendant Universal Pictures Co., Inc., in the capacity of writer and to assist in the writing of a certain motion picture photoplay entitled "So's YOUR UNCLE," and that one thousand feet of film were "knowingly, wilfully and deliberately copied, misappropriated and plagiarized by defendants and each of them." [Finding of Fact VII, Tr. pp. 34-35.] This finding was abundantly supported by the evidence and by Bruckman's own testimony that he had "patterned" the corresponding sequence in defendant's motion picture upon the sequence done in plaintiff's picture. [Tr. p. 96.]

The contention that the writer primarily responsible for pirating copyrighted material is to go quit of liability, is not new or novel. Each time that the contention has been raised, it has been held that the writer is liable for

damages as a contributory and participating infringer and joint tortfeasor. The fact that the writer does not himself project the infringing motion picture upon the screen does not bar recovery of damages because it is an essential part of the production of the picture which results in the infringement of the plaintiff's rights.

In *Cain v. Universal Pictures Co.*, 47 Fed. Supp. 1013 (D. C. Sou. Dist. Cal.), Judge Yankwich expressly held that a writer would be liable who deliberately pirated a copyrighted work:

"Infringement of copyright consists (1) of the alleged copying of a part of the plaintiff's work, and its inclusion in the scenario for the purpose of its (2) incorporation into the finished motion picture, (3) for exhibition purposes. If Taylor appropriated, as the complaint alleges, a portion of the plaintiff's work and turned it over to the other defendants, *his connection with the picture did not end then*. The material was intended by him to be used in the motion picture to be produced from the story, which was to be exhibited to the public on its completion and release.

"So the wrong done to the plaintiff in a case of this character does not lie in the mere copying of his material, which, without publication or incorporation into a motion picture, would result in no injury to him. It consists of (1) the deliberate appropriation of a portion of his work and its delivery to others for (2) inclusion in the finished picture and (3) exhibition to the public.

"Therefore, conceding that the actual distribution of the picture, following its original release, was done by others than Taylor, the action is not barred,

as to him, by the expiration of two years from the date of release. For *the continuous exhibition of the picture is one of the aims of the composition of the script by him. He is, therefore, chargeable not only with the act of composing the screen play, but is also a participant in its incorporation into the motion picture and its subsequent exhibition.*"

In *Harris v. Miller*, 50 U. S. P. Q. 625 (D. C. S. D. N. Y.), the authors of the infringing play were held to have "aided and abetted in the production of the play by furnishing the use of the infringing manuscript for which they received a royalty; they are jointly liable with the other defendants for the plaintiff's damages."

Gross v. Van Dyke Gravure Co., 230 Fed. 412, 414, 144 C. C. A. 554 (2d C. C. A.):

"Why all who unite in an infringement are not, under the statute, liable for *damages* sustained by plaintiff we are unable to see . . . as all united in infringing, all are responsible for damages resulting from the infringement."

American Telephone v. Radio Audio, 281 Fed. 200, 203:

". . . Joint infringers are joint tort feasons. An infringer and one who induces or contributes to the infringement are likewise liable *in solido* and so may be joined as defendants."

In *Towle v. Ross*, 23 Fed. Supp. 125 (D. C. Ore.), the Court held employees to be liable even when their employer was the U. S. Government and was immune from liability, the Court stating:

"The position of defendants as employees of the U. S. cannot protect them from the award of dam-

ages. The immunity of the sovereign cannot in a republic immunize its agents also. The acts were done for the benefit of the government by the employees thereof.”

The general rule is stated by *Herbert A. Howell, Assistant Registrar of Copyrights*, in his book on “*Copyright Law*” at p. 152:

“While tort feasons are jointly and severally liable for the damages sustained by the plaintiff, they may not be severally liable for any profits in which they did not share.”

Since Bruckman received no profits, his counsel is particularly anxious to have this pirate absolved from all financial responsibility for his piracy; although he deliberately misappropriated the plaintiff’s property after concededly receiving from the Harold Lloyd Corporation \$21,459 for his services as a writer and an additional sum of \$21,441 for his services as director upon the motion picture “*MOVIE CRAZY*.” [Plaintiff’s Ex. 2, Tr. p. 174.]*

Certainly Bruckman’s moral and legal delinquency in betraying and stealing from his former employer does not commend him to the leniency of this Court.

*Bruckman is alleged in plaintiff’s complaint to have received an aggregate of \$135,000 during his period of employment by the plaintiff corporation. [Tr. p. 3.]

Conclusion.

Appellants deliberately misappropriated plaintiff's property.

Their contentions upon appeal are as unjustified as their original piracy.

Their respective appeals should be dismissed, with counsel fees awarded to plaintiff's attorney as part of plaintiff's costs on appeal.

Respectfully submitted,

HAROLD A. FENDLER,

Attorney for Appellee Harold Lloyd Corporation.

APPENDIX I.

Illustrative False, Erroneous or Misleading Statements in Appellant Universal's Opening Brief.

PAGE 1.

Defendant Universal states that its appeal is "from a judgment holding that plaintiff's copyright . . . has been infringed by the use of six 'gags' or pieces of 'stage business' used in a comedy routine." *In fact*, the findings and judgment hold infringement of 57 consecutive scenes, including characters, characterizations, motivation, treatment and sequence of action consisting of an entire sequence in plaintiff's motion picture. [Tr. p. 42, par. 34.]

PAGE 2.

Defendant Universal purports to summarize the pleadings but *omits* the most important admission contained in its verified answer, to wit, that after receipt of plaintiff's written notice of infringement, it "admits that said defendant has continued with the exhibition of said motion picture photoplay." [Tr. p. 20, par. 2.] Written notice was given by plaintiff's attorney March 20, 1945; Universal's answer was verified June 2, 1945. [Tr. p. 21.]

PAGES 3-6.

Defendant Universal's purported synopses of plaintiff's and defendants' motion pictures reduce *10 pages* of the screen play and 57 consecutive scenes in each photoplay to *10 lines*, omitting all details of dialogue, characterization, motivation, treatment, arrangement and sequence of scenes, etc.

PAGE 7.

Defendant Universal states: "The *first notice* of plaintiff's claim was in a written communication received by defendant Universal from plaintiff's attorney under date of March 20, 1945." *In fact*, Universal had notice at all times during production and distribution through its writer Bruckman and its producer Yarbrough that Lloyd's material was being used. [Finding VII, Tr. p. 34; Bruckman, Tr. p. 96.]

PAGE 7.

Defendant Universal states that plaintiff "offered no evidence to refute defendants' proof that plaintiff had *deliberately* failed to notify defendants of the alleged infringement until over fifteen months." The truth is that defendants offered *no proof* plaintiff ever had any notice of the piracy of plaintiff's picture prior to March, 1945, and plaintiff's evidence showed the matter was placed in the hands of plaintiff's attorney "not long after" the matter was first called to Lloyd's attention. [Tr. p. 153.]

PAGE 8.

Defendant Universal states that Lloyd testified to the re-issue and re-make values of his own picture "without the proof of any facts to support the same." *In fact*, Lloyd's testimony showed his vast experience in production, distribution and "practically everything that there is to do with the motion picture." [Tr. pp. 98-99.] None of this testimony is quoted or referred to by defendants who did not object to Lloyd's qualifications at the trial nor to his testimony that an old motion picture had value as "a story to be sold to others" or for "re-make" or "re-issue." [Tr. pp. 107-108.]

PAGE 9.

Defendant Universal states that "the only example" which Lloyd could give of a re-issue was Chaplin's "Gold Rush." *In fact*, defendants' counsel objected to any specific examples being given by Lloyd and defendants' objections were sustained upon the grounds that the offered testimony was "irrelevant, immaterial and incompetent." [Tr. pp. 106-107.] Defendants' counsel would not even permit Lloyd to complete his voluntary statement about "The Gold Rush" for the reason that Lloyd was asking permission "to specify pictures which he desires to compare." [Tr. pp. 110-111.] *How can defendants claim Lloyd could give only one example of reissue when they prevented his giving more examples or specifying further pictures?* Defendants' own evidence completely corroborates Lloyd's testimony that reissuing a picture is a "well known practice in the industry." [See Hirliman's testimony his company bought during the last three or four years the reissue rights to seven Selznick International pictures; 35 Gaumont British pictures; 34 Samuel Goldwyn pictures, etc. Tr. pp. 422-425.]

PAGE 9.

Defendant Universal states that Lloyd "first testified that the remake rights to one of his pictures 'Milky Way' had been sold [Tr. p. 136]. He was later *obliged to admit* that the picture does not belong to me [Tr. p. 354]." This is a deliberate attempt to confuse the Court. Lloyd had starred in "Milky Way" for Paramount. He never testified that he owned or had sold the re-make rights to this picture. The testimony first quoted by defendants *omits* Lloyd's testimony that Paramount (not himself) had sold the re-make rights of Milky Way to Goldwyn. [Tr. p.

136.] Lloyd was *not* "later obliged to admit" the picture did not belong to him because he had testified in the first instance that it was Paramount which had made the sale.

PAGE 10.

Defendant Universal states that Lloyd "conceded that it was not a common practice in the industry to reissue or remake old motion picture subjects." *In fact*, his testimony was exactly to the contrary:

"Q. Is that (reissuing a picture) a well-known practice in the industry? A. Yes, it has been done many times." [Tr. p. 106.]

* * * * *

"Q. Is remaking a picture a practice which is popularly engaged in in the motion picture industry? A. Very much so." [Tr. p. 106.]

PAGES 11-12.

Defendant Universal states that Lloyd "conceded that he was not qualified and in no position to express any opinion as to the availability or value" of reissue or remake rights (Br. p. 11); and that the Court "recognized that this testimony had completely disqualified the witness." (Br. p. 12.) *In fact*, Lloyd made no such concession and all of his evidence is to the contrary. [See Tr. pp. 98-111.] The testimony quoted by defendants [Tr. p. 309] refers to "interchange" of pictures between major studios and not to sale of reissue or remake rights. The details of an exchange of pictures or talent-for-pictures between two studios would ordinarily be known only to the participants in the deal. The Trial Court repeatedly referred to the fact that Lloyd was well qualified and had a "broad comprehension of the industry." [Tr. p. 303.]

PAGE 13.

Defendant Universal claims that the Paramount picture starring Lloyd entitled "THE MILKY WAY" had only been bought as a guide for making another picture and "*not for remake.*" In fact, Lloyd testified that Paramount had sold the *remake rights* of "MILKY WAY" to Goldwyn [Tr. p. 130] and offer of proof was repeatedly made that the sale price was \$125,000 in cash *plus* the loan-out of the services of Teresa Wright, an outstanding motion picture star. [Tr. pp. 29-31, 367-8, 492; see App. Lloyd's Op. Br. pp. 7-13 incl.] Lloyd testified that after Goldwyn bought the remake rights of "Milky Way" and while it was being made over that Goldwyn used the original picture "as a guide" while remaking scenes from the Paramount picture [Tr. p. 308]; Lloyd did *not* testify, however, that the picture had been "bought as a guide . . . and *not for remake.*" The latter part of Universal's statement is directly contradicted by the evidence.

PAGE 15.

Defendant Universal states that plaintiff's witness George R. Bentel had, since 1923, acted as "author's agent in the sale of *manuscript plays for stage production*"; and that he admitted on cross-examination that productions with which he had been associated were "limited to stage plays." *Neither statement is correct.* Bentel testified he had been vice-president and general manager of Oliver Morosco's productions and had made moving pictures with Louis B. Mayer and William N. Selig [Tr. p. 197], and that he represented the entire libraries of Edward E. Rose, Jack London, James Oliver Curwood and others. [Tr. p. 197.] The Court will take judicial notice that neither Jack London nor James Oliver Curwood were dramatists

noted for stage plays and the witness expressly testified for twenty years he had acted as literary broker and had familiarized himself "with the market for motion picture rights and the value of motion picture stories" [Tr. pp. 197-198] and with the value of reissue and remake rights of pictures. [Tr. p. 198.] Yet defendants state "without proof of any supporting facts (*e. g.*, without foundation) the witness was permitted to testify." It should be noted the *defendants failed to object at the trial that the witness had not qualified as an expert.* [Tr. p. 197.]

PAGE 16.

Defendant Universal states that plaintiff's witness Bentel testified "the *ordinary period* for the remaking of a picture is four years after its release." The fact is that Bentel did testify that "some" pictures have been remade within four years but gave numerous examples of pictures remade as "talkies" although originally done as "silents" sixteen to twenty-seven years previously. [Tr. p. 205.]

PAGES 17-18.

Defendant Universal states that plaintiff's witness Botsford testified with "no supporting facts" (Br. p. 17) and that he "knew of only one comedy picture 'Hold That Blonde' in the entire history of the industry that had ever been used for remake." (Br. p. 18.) *In fact*, the Court held Botsford "qualified" by "long years of experience in the industry" [Tr. p. 461] after Botsford had testified that he had been head of the Editorial Board at Paramount as executive assistant to the head of the studio at Paramount for five years and the producer of 15 or 16 pictures at Paramount, and that later on he was managing director of the A. & S. Lyon Agency. [Tr. pp. 453-6.] Botsford

did *not* testify he knew of only one comedy picture in the history of the industry which had been remade; on the contrary, he testified that during the course of his regime at Paramount between 1930 and 1941, Paramount had made comedies as well as other types of motion pictures. When he was asked to "name some of the comedies that were remade at Paramount" defendants objected to any specific examples and their objection was sustained by the Court. [Tr. pp. 456-457.] Subsequently, Botsford mentioned a Raymond Griffith comedy entitled "Hold That Blonde" which had just been remade by Paramount with Eddie Bracken and had just opened the previous night in Los Angeles. [Tr. p. 463.] On cross-examination he was asked whether "That is the only one you can think of" and replied, "I could probably give you more if I had a little time to think of them." [Tr. p. 470.]

PAGES 20-21.

Defendant Universal states that its witness Felix Adler testified that certain "stage business" was "taken by plaintiff" from old magicians' acts, etc. Adler did *not* so testify, although he did state he personally knew of prior use of certain incidents in different form and combination which were suggested by him to plaintiff's other writers for use in plaintiff's picture "Welcome Danger." [Tr. pp. 320-325, 328.] On cross-examination, after first denying that he and Bruckman copied the Lloyd sequence at Columbia [Tr. p. 335], he eventually admitted that he and Bruckman had written the sequence for the Columbia picture "with full knowledge that it had been in the Harold Lloyd picture 'Movie Crazy.'" [Tr. p. 337.]

PAGE 23.

Defendant Universal ascribes reasons purportedly given by their producer Yarbrough for making no objection to the use of the Lloyd sequence inserted by Bruckman in the Universal picture, such as "it was a common practice," etc. There is nothing whatever in the evidence to show Yarbrough's opinions or conclusions as to why he should or should not copy Lloyd's material, excepting only that Bruckman told him he "had used the material at Columbia" and that it was "suggested by and patterned on 'Movie Crazy.'" [Tr. pp. 96, 237.]

PAGE 23.

Defendant Universal states "the producer of the Columbia picture had authorized its use for the same reasons." There is no such testimony except that defendants' witness Adler attempted to justify Columbia's piracy by Bruckman and himself through the voluntary statement that "all comedians do the same gags." [Tr. p. 338.] Defendant Universal implies that Lloyd knew all about the infringing Columbia picture for two years prior to the release of Universal's infringing short and that such Columbia release proceeded "without plaintiff's objection." All of the evidence shows that Lloyd never heard of the Columbia picture until a few days before the trial of this action [Tr. p. 151]; and even Adler, defendants' witness and the writer of the infringing Columbia "short" testified, "I do not believe they play around here in Los Angeles; I have never seen a [that] Columbia picture here." [Tr. p. 336.]

PAGE 24.

Defendant Universal states that “the Court had said that none of the plaintiff’s witnesses were qualified to establish damage.” No such statement was ever made by the Court. Defendants’ references to the transcript are long before Botsford had testified; before Landau and Bentel had completed their testimony and before Lloyd had been called as a witness for the defendants.

PAGE 24.

Defendant Universal states that Lloyd admitted he had “no knowledge of any common practice of dealing in re-issue and remake rights.” *In fact*, Lloyd’s testimony is to the contrary. [See Tr. pp. 105, 106, 107, 369.]

PAGE 25.

Defendant Universal states that the Court recognized Lloyd was “not qualified to testify” as to practices in the industry. The Court did *not* so state; on the contrary, the Court commented on Lloyd as having “a broad comprehension of the industry.” [Tr. p. 303.]

PAGES 25-28.

Defendant Universal so distorts the testimony of their witness Hirleman so as to imply that he qualified as an expert on the value of “remakes” as well as “reissues”; and that he testified that the Lloyd picture had *neither* remake *nor* reissue value because “whether a picture has any remake value depends upon whether it has any re-issue value.” [Tr. p. 427.] This was *not* Hirleman’s

testimony which we quote verbatim from the transcript page referred to by defendants:

“(Testimony of George A. Hirleman):

The Witness: Well, I never buy for re-make purposes. I only buy first for re-issue and if it has re-make value that adds value to me, but if it had only re-make value I would not be interested in it.

The Court: So you don’t know?

The Witness: I don’t know so far as anyone else is concerned.

The Court: But *you have no opinion as to the re-make value?*

The Witness: *No, sir.”*

Hirleman thus expressly *disqualified* himself as an expert on “re-make” value as to which he stated to the Court he had “no opinion.” [Tr. p. 427.]

PAGE 29.

Defendant Universal states that “Lloyd had testified that the re-issue rights had never been sold, licensed or disposed of to any of his pictures.” Lloyd did *not* so testify; he stated Paramount had sold the re-make rights of “Milky Way” to Goldwyn [Tr. p. 136]; but that *he* had never had them up for sale. [Tr. p. 354.] Defendants’ witness Hirleman did *not* contradict Lloyd when he testified he bought certain re-issue rights in an old silent picture from *Pathe*. [Tr. p. 429.]

PAGE 30.

Defendant Universal states that there was “unimpeached testimony of *both* plaintiffs and defendants’ witnesses that such rights . . . had no re-issue value.” This is untrue. No plaintiff’s witness so testified. All of

plaintiff's expert witnesses, Lloyd, Botsford, Landau, and Bentel, contradicted—and thus impeached—the evidence of defendants' witness on this point. [See Lloyd, Tr. pp. 104, 105, 107; Landau, Tr. pp. 256, 258; Bentel, Tr. p. 203, Botsford, Tr. pp. 460-465.]

PAGE 30.

Defendant Universal prints parenthetically a statement by their own counsel relating to Lloyd's silent picture "Safety Last" in such a manner as if it were evidence given by defendants' witness Hirliman. This is grossly misleading because Hirliman did not so testify, and a statement by counsel is *not evidence*.

PAGE 31.

Defendant Universal states that Hirliman "was *plaintiff's* witness." *In fact*, Hirliman was called and testified solely on behalf of *defendants*. [See Tr. p. 420.]

PAGE 31.

Defendant Universal's description of Hirliman's testimony is completely inaccurate because the pages of the transcript referred to by Universal do not contain the language attributed to the witness such as "gags," "stage business," "comedy routine," "comedy accretion," etc. [See Tr. pp. 447-448.] These terms are supplied solely by Universal's counsel.

PAGE 33.

Defendant Universal states that the trial court "recognized that as this sequence was not a part of the general theme, it could be deleted without affecting the picture." The trial court did *not* so state and its oral opinion [Tr.

p. 520] and findings of fact are to the contrary. [Tr. p. 34.] During Hirleman's testimony, the trial court made it clear that defendants' testimony that the magician's coat sequence was not a material fact in the picture, was simply "wasting time" because the court said "I saw the picture and I have my own views as to the value of that sequence." [Tr. p. 447.] Previously, the trial court itself developed testimony that plaintiff's picture could not be re-issued without the sequence because the result is "that it would be a short; it would change the picture so it could not be issued in its present form." [See Tr. p. 140.]

PAGE 33.

Defendant Universal's counsel again injects the terms "gags," "stage business," and "comedy routine," stating that Lloyd "*conceded*" that the 57 consecutive scenes slavishly copied by defendants merely was a "sequence of gags," and that the court "acquiesced" in the contention that the "sequence of these 'gags' or 'stage business' was the subject of copyright protection and judgment was rendered on that basis." Lloyd did *not* so concede *nor* did the Court render judgment "on that basis." Lloyd did testify that there were "gags within the comedy scene" but expressly stated "those (57 consecutive) comedy scenes make up the whole sequence" [Tr. p. 137]; that "the whole sequence is naturally tied into the story; it is the heart of our story and without that particular sequence tied into the story it is certainly destroyed" [Tr. p. 147]; that the sequence is an "integral and essential part of the story and plot," and "plays a functional part in the development of the picture." [Tr. pp. 138-9.]

PAGE 35.

Defendant Universal states “The Court said that none of the plaintiff’s witnesses were qualified to evaluate such (re-issue or re-make) rights [Tr. pp. 303, 371.]” This is a repetition of the same untrue assertion made on page 24 and appears in somewhat different form on page 67 of Universal’s opening brief. No such statement was ever made by the Court. On the contrary, the Court commented on Lloyd’s “broad comprehension of the industry” [Tr. p. 303]; and expressly held Botsford to have “qualified” as “a man with long years of experience in the industry.” [Tr. p. 461.]

PAGE 35.

Defendant Universal states that “Lloyd *conceded* that he had no experience in that (distribution) end of the business.” *Lloyd made no such concession and testified to the contrary.* [Tr. pp. 98, 369.] In fact, the very page of the transcript referred to by defendant Universal shows that Lloyd testified he had been “injected into the distribution end of the business and all the other forms of the business.” [Tr. p. 369.]

PAGE 35.

Defendant Universal’s counsel states “The Court’s determination that such rights to plaintiff’s picture had a substantial value was based solely upon this (Lloyd’s) testimony.” The Court did *not* at any time make such a statement and it is obvious from the record that Lloyd’s testimony was fully corroborated by Botsford [Tr. pp. 453-464]; Landau [Tr. pp. 253-258], and Bentel [Tr. pp. 196-198, 203, 406, 410]. See our opening brief for cross-examination of appellant Lloyd, pages 20-24.

PAGE 35.

Defendant Universal states "all of plaintiff's witnesses conceded that no picture had ever been re-made and only one re-issued of this nature." (Br. p. 35.) This is a gross misstatement. Lloyd testified to Chaplin's "Gold Rush" having been re-issued [Tr. p. 364], and Lloyd's own "Milky Way" being currently re-made by Goldwyn. [Tr. pp. 368, 370.] Botsford testified that comedies had been re-made at Paramount during the eleven year period he was executive assistant to the head of the studio [Tr. pp. 456-7] but defendants' counsel *objected* to any names of such comedies being stated by the witness. [Tr. p. 457.] Previously he had mentioned a comedy entitled "Hold That Blonde" which had "opened" the night before Botsford testified and was a "re-issue" of a Raymond Griffith comedy. [Tr. p. 463.] Botsford expressly testified "I could probably give you more if I had a little time to think of them." [Tr. p. 470.] This evidence is directly contrary to defendant Universal's flat assertion that "plaintiff's witnesses conceded that no picture had ever been re-made and only one re-issued." (Br. p. 35.)

PAGES 35-37.

Defendant Universal makes the highly misleading argument that the trial court "assessed damages upon the erroneous theory . . . that it could add such arbitrary amount" of damages to defendant's profits as it might deem proper under the "in lieu of" provision of Section 25 of the Copyright Act. (Br. pp. 35-37.) The truth is that the trial court did *not* award "arbitrary damages" under the "in lieu of" provision of Section 25; nor did it "add" arbitrary damages to defendants' profits in reach-

ing its final determination as to the amount of actual damages sustained. The trial court clearly stated that it was fixing "*actual damages suffered*" by the plaintiff. [Tr. p. 522.]

PAGES 38-39.

Defendant Universal states the trial court *fixed such damages of \$40,000* upon the erroneous finding that defendant Universal continued to release and distribute its picture "with notice and knowledge of plaintiff's rights in the premises" and would continue so to do "unless permanently restrained and enjoined from so doing." (See also, Universal's Brief, p. 71.) No statement could be more misleading or farther from the truth. The damages were not "fixed" nor "based" upon the injunctive finding; and that finding was *not* erroneous because, as we shall show, it was predicated upon admissions in the defendant's answer [Tr. p. 20, Par. II], and upon statements of defendant's counsel. [Tr. pp. 345, 452.]

Damages which had accrued prior to the institution of the lawsuit and which were pleaded [Tr. p. 5] and proven [Tr. pp. 35-36, Par. IX and X] had no relation to the injunction or supporting finding of continued distribution with notice and knowledge of plaintiff's rights. [Par. IX, Tr. p. 36.]

Plaintiff's first cause of action was solely for damages accrued prior to April 4, 1945, the date complaint was filed [Tr. p. 7] and defendant's own evidence showed Universal's writer Bruckman and Universal's producer Yarbrough were at all times prior to that date and during the production of the picture, fully informed that Universal's sequence was patterned after the Harold Lloyd sequence in "Movie Crazy." [Tr. pp. 95-96.] The trial court's finding of "notice and knowledge" is, therefore,

not erroneous, but is based upon defendant's own uncontradicted evidence.

The finding objected to by appellant Universal is furthermore based upon the admissions contained in its answer to plaintiff's second cause of action, as follows [Tr. p. 20, Par. II]:

"This answering defendant admits that on or about the 20th day of March, 1945, plaintiff gave this defendant a notice in writing demanding that said defendant cease and desist from further distribution, exhibition, or release of said defendant's motion picture photoplay entitled 'So's Your Uncle,' and *admits that said defendant has continued with the distribution and exhibition of said motion picture photoplay.*" [Tr. p. 20.]

Defendant Universal verified this answer June 2, 1945. [Tr. p. 21.]

On September 13, 1946, *six months after the written notice*, Universal's counsel stated in open court that the picture "*will be*" withdrawn [Tr. p. 345] not that it had been withdrawn; and later Universal's counsel expressly stated he did not contend that plaintiff was not entitled to an injunction [Tr. p. 452]:

"Mr. Fendler: You do not contend the plaintiff is not entitled to an injunction, do you?

"Mr. Abeles: No."

Universal repeats its misstatement about damages being "based upon" the injunctive finding in Point VI of its opening brief (pp. 71, 72); but it is apparent from the record that finding of fact XI [Tr. p. 36] is fully supported by the stipulations and statements of defendant's counsel, by the evidence, and by the admission in Universal's verified answer.

Explanatory Note.

The foregoing 35 instances are not intended to represent all of the false, erroneous, or misleading statements contained in Universal's Opening Brief but are merely illustrative. There are many additional such statements and innumerable repetitions thereof in the first 38 pages as well as in the balance of that brief.

Appellant Universal's legal argument is largely predicated upon erroneous summaries of the evidence or of the findings made by the trial court. This brief contains our answers thereto. (See particularly Points III, IV and V, *supra*.)

Upon all questions of fact we respectfully refer the court to the record.

APPENDIX II.

"The Deadly Parallel."

The sequence of incidents and action common to plaintiff's picture "Movie Crazy" and defendant's picture "So's Your Uncle."

"MOVIE CRAZY"

SCENE: INTERIOR MAGICIAN'S DRESSING ROOM.

Poster on wall establishes this is the room of HENRY THE GREAT, a magician. Other signs and props signify the same thing. A magician's assistant is preparing his full dress coat, putting things into the pockets, etc. The coat is lying over the back of a chair. The assistant squeezes a bulb concealed in the coat and water squirts from a flower in its lapel. (Reel 7, Scene 22.)

SCENE: INTERIOR LARGE LUXURIOUSLY APPOINTED HOTEL NIGHT CLUB.

Harold arrives at Mary's table wearing magician's coat and is introduced to other guests at table. He commences to dance with Mrs. Kitterman. A miniature clothes line begins to appear from Harold's coat and as Harold dances away the line stretches out, revealing thereon miniature lingerie and other clothes. Finally, the end of the

"SO'S YOUR UNCLE"

SCENE: INTERIOR MAGICIAN'S DRESSING ROOM.

Poster on wall establishes this is the room of the GREAT VAN DINI, a magician. Other signs and props confirm this. The magician is preparing his full dress coat, putting things into pockets, etc. The coat is lying over the back of a chair. He squeezes a bulb in the coat and water squirts from a flower in its lapel. (Reel 4, Scene 2.)

SCENE: INTERIOR LARGE LUXURIOUSLY APPOINTED NIGHT CLUB.

Steve arrives at Pat's table wearing magician's coat and is introduced to other guests at table. He commences to dance with Pat. A bird suddenly flies up between Steve and his partner, apparently coming from Steve's coat and lights on a woman dancer's head to her consternation. . . . A miniature clothes line begins to appear

(“Movie Crazy”)

laundry line comes loose. Harold does not appear to realize it has come from his coat. Suddenly a bird flies up between Harold and his partner, apparently coming from Harold's coat and lights on a man dancer's head, to his consternation. (Reel 8, Scenes 2-6.)

SCENE: CLOSEUP OF DRUNK SEATED AT RINGSIDE TABLE ADJOINING DANCE FLOOR.

He is at that stage of inebriation characterized by glassy eyes, delayed reflexes, and an amiable though somewhat foggy attitude toward anything happening around him or to him. A fly lands on his forehead and he tries to dislodge it. He slaps at it violently with his left hand and seems well pleased with the effect since the fly is gone. But the fly comes back and lands on his forehead again. He is annoyed and seems about to slap at the fly once more.

CAMERA PANS to Harold dancing.

INSERT: An egg drops from Harold's coat sleeve and into his hand.

CLOSEUP: Harold, a startled expression followed by a look of dismay appears on Harold's face. He holds egg up and

(“So's Your Uncle”)

from Steve's coat and as Steve continues dancing, the line stretches out, revealing miniature lingerie and other clothes. Finally, the end of the laundry line comes loose. Steve does not appear to realize it has come from his coat. (Reel 4, Scenes 6-11.)

SCENE: CLOSEUP OF DRUNK SEATED AT RINGSIDE TABLE ADJOINING DANCE FLOOR.

He is at that stage of inebriation characterized by glassy eyes, delayed reflexes, and an amiable though somewhat foggy attitude toward anything happening around him or to him. A fly lands on his forehead and he tries to dislodge it. He slaps at it violently with his left hand and seems well pleased with the effect since the fly is gone. But the fly comes back and lands on his forehead again. He is annoyed and seems about to slap at the fly once more.

CAMERA PANS to Steve dancing.

INSERT: An egg drops from Steve's coat sleeve into his hand.

CLOSEUP: Steve, a startled expression followed by a look of dismay appears on Steve's face. He holds egg up and looks

(“Movie Crazy”)

looks at it with a harassed and baffled air. He is trying desperately to find something to do with the egg.

The drunk swats at the fly once more and misses. . . . Harold drops the egg into the drunk's hand which is held in readiness to swat the troublesome fly once more. The fly lands on his forehead once more, and with a final violent effort, he slaps at it with the hand containing the egg. The egg breaks messily and covers him with goo which does not seem to upset him at all. (Reel 8, Scenes 16-22.)

SCENE: MEDIUM SHOT
OF HAROLD DANCING
WITH PARTNER ON
DANCE FLOOR.

While Harold is dancing and for no apparent reason, he suddenly gives two or three convulsive jerks. Something is obviously bothering him but he doesn't seem to know what it is. However, after a moment, he reaches into the tail pocket of his coat and brings forth a live white rabbit.

As they dance, Harold holds the rabbit behind Mrs. K.'s back, looking about over her shoulder with the bewildered expression of a man who wants to dispose of a live white rabbit on the

(“So's Your Uncle”)

at it with a harassed and bewildered air. He is trying desperately to find something to do with the egg.

The drunk swats at the fly once more and misses. . . . Steve drops the egg in the drunk's hand which is held in readiness to swat the troublesome fly once more and with a final violent effort, he slaps at it with the hand containing the egg. The egg breaks messily and covers him with goo, which does not seem to upset him at all. (Reel 4, Scenes 13-22.)

SCENE: MEDIUM SHOT
OF STEVE DANCING
WITH PARTNER ON
DANCE FLOOR.

While Steve is dancing and for no apparent reason, he suddenly gives two or three convulsive jerks. Something is obviously bothering him, but he doesn't seem to know what it is. However, after a moment, he reaches into the tail pocket of his coat and brings forth a live white rabbit.

As they dance, Steve holds the rabbit behind Pat's back, looking about over her shoulder with the bewildered expression of a man who wants to dispose of a live white rabbit on the

(“Movie Crazy”)

dance floor of a night club without it being known.

Harold tries to think of something to do with the rabbit when suddenly he sees the solution; a waiter with a large covered silver platter.

As the waiter passes Harold, he pauses a moment, turning away from Harold, giving Harold an opportunity to put the rabbit on the platter, replacing the cover.

The waiter goes on to the table of the same drunk who earlier broke the egg against his forehead and removes the cover over the platter while the drunk's eyes widen in astonishment as he sees the live rabbit.

Convinced by this weird sight that he has had too much to drink, the drunk rises and staggers away. (Reel 8, Scenes 25-29.)

MEDIUM CLOSEUP OF
HAROLD AND MRS. K.

Harold puts hands on his hips. As he does so, water squirts from the flower in his lapel into Mrs. K.'s face. Harold isn't aware that he has caused this. Mrs. K. gives a little scream and wipes her face with her handkerchief. Harold, noticing this, assumes it to be perspiration. Harold says, "It's warm, isn't it?" Mrs. K. replies. "Why, yes. Yes, it—it is."

(“So's Your Uncle”)

dance floor of a night club without it being known.

Steve tries to think of something to do with the rabbit, when suddenly he sees the solution; a waiter with a large covered silver platter.

As the waiter turns away from Steve at the drunk's table, he gives Steve an opportunity to put the rabbit on the platter and replace the cover.

The waiter sets the covered platter before the drunk who earlier broke the egg against his forehead and removes the cover while the drunk's eyes widen in astonishment as he sees the live rabbit.

Convinced by this weird sight that he has had too much to drink, the drunk "rises terrified," then falls on floor. (Reel 4, Scenes 28-31.)

MEDIUM CLOSEUP OF
STEVE AND MRS. B.

Steve bows toward Mrs. Bufington. As he does so, water squirts from the flower in his lapel into Mrs. B.'s face. Steve isn't aware that he has caused this. Mrs. B. gives a little scream and wipes her face with her handkerchief. Steve noticing this, assumes it to be perspiration. Steve says, "It is warm tonight, isn't it?" Mrs. B. replies, "It is certainly."

(“Movie Crazy”)

Water again squirts into Mrs. K.'s face and once more she wipes it as CAMERA TRUCKS to show a couple at a nearby table where a man is flipping water at his girl with his finger from a glass on the table. Mrs. K., seeing this, picks up a glass of water and with righteous indignation throws it into the man's face. (Reel 8, Scenes 30-31.)

SCENE: HAROLD AND PARTNER DANCING:

Both are blithely unaware of the fact that a little mouse is sitting on Harold's shoulder. Mrs. Kitterman and her partner dance into scene and Mrs. Kitterman and Harold bump into each other as they dance back to back. This dislodges the mouse from Harold's shoulder and it falls down the back of Mrs. Kitterman's evening dress. She screams and then continues to scream at frequent intervals as she squirms and twists, clutching at the back of her dress, trying to get rid of the mouse. Harold watches the commotion, completely unaware of having any connection with it.

Suddenly Harold becomes aware of something else in the tail of his coat and investigating, brings forth a small box filled with a number of other

(“So's Your Uncle”)

Water again squirts into Mrs. B.'s face and once more she wipes it as CAMERA TRUCKS to show a couple at a nearby table where a man is stirring water with his finger from a glass on his table. Mrs. B., seeing this, picks up a glass of water and with righteous indignation throws it into the man's face. (Reel 4, Scenes 25-27.)

SCENE: STEVE AND PARTNER DANCING:

Both are blithely unaware of the fact that a little mouse is sitting on Steve's shoulder. Mrs. Buffington and her partner dance into scene and Mrs. Buffington and Steve bump into each other as they dance back to back. This dislodges the mouse from Steve's shoulder and it falls down the back of Mrs. Buffington's evening dress. She screams and then continues to scream at frequent intervals as she squirms and twists, clutching at the back of her dress, trying to get rid of the mouse. Steve watches the commotion, completely unaware of having any connection with it.

Suddenly Steve becomes aware of something else in the tail of his coat and investigating, brings forth a small box filled with a number of other

(“Movie Crazy”)

mice. Aghast at this discovery he drops the box on the dance floor. CLOSEUP OF BOX ON FLOOR: Mice scamper away in all directions.

MEDIUM LONG SHOT OF DANCE FLOOR:

General pandemonium has broken loose, people are running in all directions, women screaming, etc. (Reel 8, Scenes 40-48.)

CLOSEUP: Girl petrified with fright: CAMERA PANS down her legs revealing a mouse crawling up one leg. As she raises her skirt before the mouse's upward advance we discover that she has been indulging in stealing some silverware which she has placed in her garters. (Reel 8, Scene 50.)

MEDIUM SHOT: of a girl about to climb on a table when a young man of what one might call the “dainty” type, places a hand on her shoulder pulling her down from the table and gets on it himself instead. He pulls his trouser legs up a little and dances in fright upon the table top, screaming in lady-like terror.

(“So's Your Uncle”)

mice. Aghast at this discovery he drops the box on the dance floor. CLOSEUP OF BOX ON FLOOR: Mice scamper away in all directions.

MEDIUM LONG SHOT OF DANCE FLOOR:

General pandemonium has broken loose, people are running in all directions, women screaming, etc. (Reel 4, Scenes 34-45.)

CLOSEUP: Girl petrified with fright: CAMERA PANS down her legs revealing a mouse crawling up one leg. As she raises her skirt before the mouse's upward advance we discover that she has been indulging in stealing some silverware which she has placed in her garters. (Reel 4, Scenes 48-50.)

MEDIUM SHOT: of two girls about to climb on a table when a young man of what one might call the “dainty” type, steps between them, and putting a hand on the shoulder of each, prevents them from getting on the table and gets on to it himself instead. He pulls his trouser legs up a little and dances in fright upon the table top, screaming in lady-like terror.

(“Movie Crazy”)

MEDIUM CLOSE SHOT: Same young man screaming and waving his hands with his trousers now pulled up almost to his knees. People rush past in all directions. (Reel 8, Scenes 53-55.)

CLOSE SHOT OF MAGICIAN: As magician takes his coat from Harold, he says: “I ought to knock your block off.” (Reel 8, Scene 56.)

(“So’s Your Uncle”)

MEDIUM CLOSE SHOT: Same young man screaming and waving his hands with his trousers now pulled up almost to his knees. People rush past in all directions. (Reel 4, Scene 46.)

CLOSE SHOT OF MAGICIAN: As magician takes his coat from Joe, he hits him on chin and knocks him to floor. (Reel 4, Scene 56.)

No. 11286

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

UNIVERSAL PICTURES COMPANY, INC., a Delaware Corporation, and CLYDE BRUCKMAN,

Appellants,

vs.

HAROLD LLOYD CORPORATION, a California corporation,

Appellee.

HAROLD LLOYD CORPORATION, a California corporation,

Appellant,

vs.

UNIVERSAL PICTURES COMPANY, INC., a Delaware Corporation, and CLYDE BRUCKMAN,

Appellees.

REPLY BRIEF FOR CROSS-APPELLANT
HAROLD LLOYD CORPORATION.

FILED

DEC - 3 1946

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CLERK

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No. 11286

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

UNIVERSAL PICTURES COMPANY, INC., a Delaware Corporation, and CLYDE BRUCKMAN,

Appellants,

vs.

HAROLD LLOYD CORPORATION, a California corporation,

Appellee.

HAROLD LLOYD CORPORATION, a California corporation,

Appellant,

vs.

UNIVERSAL PICTURES COMPANY, INC., a Delaware Corporation, and CLYDE BRUCKMAN,

Appellees.

REPLY BRIEF FOR CROSS-APPELLANT HAROLD LLOYD CORPORATION.

Preliminary Comment on Defendants' Reply Briefs and Their Inconsistent Position on the Cross-Appeal.

Defendants Universal and Bruckman do not agree with each other upon the scope or effect of the evidence or findings made by the trial court. Universal argues that "the

record is devoid of any factual evidence to support the court's award of actual damages in the sum of \$40,000." (Universal's Reply Br. p. 8.) Bruckman, on the other hand, takes the position that the findings of the trial court are based "upon conflicting evidence" (Bruckman's Reply Br. p. 2) and that "the rule is well settled that an Appellate Court will not disturb the findings of the trial court where the findings are based upon conflicting evidence." (Bruckman Reply Br. p. 6.)

In fact, appellant Bruckman concludes his argument that "the credibility of the witnesses and the weight of the testimony were for the trial court" (Bruckman Reply Br. p. 4) by flatly stating:

"Obviously the findings of the trial court cannot be overthrown." (Bruckman Reply Br. p. 8.)

Universal has once again completely misstated the evidence in its reply brief upon our cross-appeal. We do not feel a discussion of facts has any place in a closing brief, and for that reason alone, we merely mention that Universal has made *six misstatements* of the evidence on pages 2 and 3, and *sixteen misstatements* on pages 17, 18 and 19. Since these are for the most part mere repetition of misstatements made in their opening brief and fully replied to in our brief for appellee (particularly the Appendix thereto), we are satisfied to stand upon the record without further comment.

In order to avoid any confusion engendered by erroneous statements as to our contentions, however, we desire to restate the issues upon the cross-appeal as follows:

Restatement of Issues on Cross-Appeal.

1. Is the judgment for actual damages inadequate?
2. Is the plaintiff entitled to profits “as well as” damages; and if so, does the *Sheldon* case require an arbitrary allocation of twenty per cent (20%) of the profits in the absence of evidence supporting such proportionment?
3. Does the Court have discretion to award statutory damages in lieu of actual damages and profits, where it is difficult to ascertain the exact amounts of damages “as well as” profits which have resulted from the infringements or where for any other reason, justice requires an award of statutory damages in order to reasonably compensate the victim of deliberate infringements?

POINT I.

The Award of Damages Is Inadequate and Should Be Increased to an Amount at Least Equal to the Price Defendants Would Have Been Required to Pay Plaintiff Had They Purchased Instead of Stolen Plaintiff’s Copyrighted Material.

Both Bruckman and Universal virtually *concede* that plaintiff’s evidence of damage, and particularly plaintiff’s expert evidence of special damage, would have supported a judgment of \$300,000. Lloyd’s testimony was that the diminished value of his property following defendants’ infringements was \$300,000: \$100,000 for decreased value of reissue rights plus \$200,000 for decreased value of remake rights. [Tr. pp. 104, 105.] Landau’s testimony was in accord. [Tr. pp. 256-258.] Botsford estimated Lloyd’s damages at \$225,000 to \$250,000 as follows: damage to reissue rights \$100,000 plus damage to remake rights

“from \$125,000 to \$150,000.” [Tr. p. 462.] Bentel’s evidence showed damages to Lloyd of \$360,000, being a loss of 90% of the value of reissue rights worth \$150,000 and remake rights worth \$250,000. [Tr. p. 203.]

Notwithstanding this testimony (which was uncontradicted as to the value of remake rights destroyed), the trial judge discounted and minimized plaintiff’s evidence of damages and all other evidence relating to production and distribution costs and profits in the motion picture industry, and in so doing, refused to follow well accepted legal principles: (1) that all doubts must be resolved *against* a deliberate infringer; and (2) that the court must make an award “which by no possibility shall be too small.” (*Sheldon v. Metro Goldwyn Pictures Corp., et al.*, 106 F. (2d) 45 at p. 51, affirmed 309 U. S. 390, 60 Sup. Ct. Rep. 681, 84 L. Ed. 825.)

It is extremely significant that in the *Sheldon* case the U. S. Supreme Court upheld the Second Circuit Court of Appeals in making an award which was *four times as large* in amount as the plaintiffs had agreed to accept for the motion picture rights misappropriated, and the award of profits was 100% to 400% larger than the *highest* amount testified by the experts.

In the case at bar the trial court refused to apply the tests laid down in the *Sheldon* case:

1. The judgment for \$40,000 is *less than one-fifth of the minimum value* of the remake rights of plaintiff’s motion picture: Lloyd and all of plaintiff’s expert witnesses evaluated these rights at \$200,000 which would have been the lowest possible purchase price if Universal had attempted to purchase these rights and Lloyd had consented to sell them.

2. Considering the figures testified to by the experts as “fanciful” and “fantastic” the trial court made no

attempt to give the expert evidence and the plaintiff “the benefit of every doubt” and a judgment which “by no possibility shall be too small” and awarded a fraction of the actual amount of plaintiff’s damages—although the court in the *Sheldon* case held the award might be two to four times *greater* than the expert evidence and even in such event held that a deliberate infringer “cannot complain.” (309 U. S. at p. 408.)

Although the evidence unquestionably sustains the findings to the extent of \$40,000 as *conceded* by appellant Bruckman (Reply Br. pp. 2, 4, 6, 8) such evidence also sustains and compels an award of at least \$200,000 or more and under the principles enunciated in the *Sheldon* case this Court should increase the award to an amount commensurate with plaintiff’s injury.

In *Horvath v. McCord Radiator & Mfg. Co.*, 100 F. (2d) 326 (certiorari denied 308 U. S. 581, 60 Sup. Ct. 101, 84 L. Ed. 486), the Sixth Circuit Court of Appeals *increased* the judgment of the trial court from \$80,334.76 to \$120,502.11, stating at page 335:

“McCord is an infringer and the burden must be placed upon it as the wrongdoer and it is the duty of the court to find for Horvath with reasonable approximation that to which he is entitled, and in so doing, there is no duty to exercise meticulous care to avoid a hardship on McCord. *Sinclair Refining Company v. Jenkins Petroleum Process Company*, 289 U. S. 689, 700, 53 S. Ct. 736, 77 L. Ed. 1449, 88 A. L. R. 496.”

See, also:

K. W. Ignition Co. v. Tempco Elec. Motor Co., 283 Fed. 873 (6th C. C. A.), where damages of \$50,000 awarded by the District Court were *doubled* by the Circuit Court of Appeals.

POINT II.

Where Both Damages and Profits Result From Wilful Infringement the Copyright Proprietor May Recover Profits "as Well as" Damages.

Appellant Universal is completely in error in contending that "if damages are proven and the profits ascertained the statute does not permit recovery of both but gives the plaintiff his choice" (Universal's Reply Br. p. 13).

The phraseology used by the statute is that the infringer is required "to pay to the copyright proprietor such damages as the copyright proprietor may have suffered due to the infringement *as well as* all the profits which the infringer shall have made from such infringement" (Copyright Act, Section 25b).

Certainly there is nothing in the language of the Copyright Act to justify appellant's construction that plaintiff may recover *either* damages *or* profits but that "the statute does not permit recovery of both."

It is our contention that the only "rule of law" is one which is flexible enough to permit a fair and just award in any conceivable situation. We believe the statute vests such discretion in the court. (See Point IV, *post*, p. 12, with authorities there cited.) If the profits are large and the damages are small or unproven as in the *Sheldon* case, perhaps an award of profits alone is just and adequate compensation. If the provable damages are large and the provable profits are small, perhaps the damages alone constitute a fair, just and adequate award. But circumstances may arise where it requires an award of both damages and profits to adequately compensate the proprietor of a copyright infringed.

We submit the instant case of deliberate and wilful infringement is a proper case to allow profits in addition to the damages and after most careful research we can find no copyright cases where both damages and profits have been pleaded and proven and the court has declined to award profits in addition to damages. On the contrary, all of the copyright authorities heretofore cited by us expressly hold that the plaintiff is entitled to recover profits "in addition to" damages. (18 *Corpus Juris*, Sec. 248, *Amdur Copyright Law & Practice*, p. 1117, para. No. 6 "*Profits in addition to Damages*"; *Atlantic Monthly Co. v. Post Pub. Co.*, 27 F. (2d) 556; *Siebring Pottery v. Steubenville Pottery*, 9 Fed. Supp. 384; *Goldmark v. Kreling*, 25 Fed. 349, 356.)

Appellant Bruckman's reply to these cases is that they "all antedate" the decision in *Sheldon v. Metro-Goldwyn Corporation*, 84 L. Ed. 825. (Reply Br. p. 11.) But *since* the decision in the *Sheldon* case—which did not involve both damages and profits but which related solely to whether or not there should be an apportionment of profits—the Second Circuit Court of Appeals *affirmed* the District Court decision in *Detective Comics Inc. v. Bruns Publications Inc.* (D. C. S. D., N. Y.), 28 F. Supp. 399, 41 U. S. P. Q. 182, awarding plaintiff *both* damages and profits; the court fixing damages in the sum of \$1,000 and appointing a master to report on profits for which the defendants were required to account. The Second Circuit Court of Appeals' decision is reported in 111 F. (2d) 432, 45 U. S. P. Q. 291, and was decided April 29, 1940 by a unanimous court one month after the decision of the U. S. Supreme Court in the *Sheldon* case (March

25, 1940), which affirmed the decision of the Second Circuit Court of Appeals reported in 106 F. (2d) 45, 42 U. S. P. Q. 540.

Appellants are in no position to contend that the Second Court of Appeals in upholding a judgment for *both* damages and profits in the *Detective Comics* case, *supra*, was not fully cognizant of the content, scope and effect of the *Sheldon* opinion handed down a month earlier by the Supreme Court.

POINT III.

The Sheldon Case Affirms the Rule of Law That All Profits Derived From Deliberate Infringement Must Be Awarded to the Copyright Proprietor in the Absence of Substantial Evidence Supporting a Just Apportionment.

We contended in our Cross-Appellant's Opening Brief (Point II, pp. 32-36) that there was "no evidence to sustain the arbitrary allocation by the trial court of 20% of defendant's profits to their copyright infringement." Appellant Universal argues (Reply Br. p. 15) that such 20% apportionment is "the rule of law" established in *Sheldon v. Metro-Goldwyn Corporation*, 309 U. S. 390, 408. Appellant Bruckman echoes this contention. (Bruckman's Reply Br. p. 10.)

Both appellants *ignore* the fact that there was abundant uncontradicted expert evidence to sustain allocation of profits in the *Sheldon* case wherein the United States Supreme Court expressly stated "the evidence is sufficient to provide a fair basis of division." (309 U. S. 390, at p. 402.)

The *Sheldon* case did *not* provide "a rule of law" that *in the absence of any evidence* an arbitrary allocation of 20% of the profits was proper. In fact the Supreme

Court commented upon the "elaboration of detail" with which "petitioner's expert witnesses gave their views as to the extent to which the use of the copyrighted material had contributed to the profits in question," all witnesses being "in complete agreement that the portion of profits attributable to the use of the copyrighted play . . . was very small." (309 U. S. 390 at pp. 407, 408.) *It was this uncontradicted expert evidence upon which both the Second Circuit Court of Appeals and the U. S. Supreme Court based their respective decisions.* Previous decisions of the U. S. Supreme Court awarding *all* profits in the absence of evidence of proper apportionment, were re-affirmed. (See 309 U. S. at p. 401 citing *Callaghan v. Myers*, 125 U. S. 617, 9 S. Ct. 177, 32 L. Ed. 547, and *Belford Clarke Co. v. Scribner*, 144 U. S. 488, 12 S. Ct. 734, 740, 36 L. Ed. 514.)

Appellant Universal states that this Court in *Stonesifer v. 20th Century Fox Film Corp.*, 140 F. (2d) 579, "recognized the determination of the *Sheldon* case as a *rule of law* in making an apportionment of 20% without any supporting evidence." In the *Stonesifer* case, however, neither party to the appeal raised any question as to the necessity of evidence, expert or otherwise, to support the apportionment and the record shows this question was never even raised in or considered by the trial court. Since the issue was not raised either in the trial court or upon appeal, we do not consider the case a precedent: nor could it be wisely followed. "Circumstances alter cases" and since the only authority for the apportionment in the *Stonesifer* case was the *Sheldon* case (in which there was abundant evidence to support the apportionment), appellants cannot claim more for the *Stonesifer* case than the authority upon which it in turned rested.

Furthermore, it would be as dangerous and illogical to say that the *Sheldon* case established a rule of law re-

quiring an apportionment of 20% of the profits in every case (regardless of evidence) as to say that the *Sheldon* case required a flat award of \$117,000 in every case (regardless of the evidence) or to say that the proprietor of a copyright infringed would in all cases be entitled to receive four times the amount at which he had agreed to sell the copyrighted property:*

In *Davilla v. Brunswick-Balke-Collender Co.*, 94 F. (2d) 567, cited by defendant Universal (Reply Br. p. 12), the Second Circuit Court of Appeals decided that a plaintiff was entitled to 100% of the profits realized from the sale of a double phonograph disc, upon only one side of which appeared the infringing musical composition which had first been published eight years previously and which had apparently fully run its course. Despite the fact that the other side of the disc contained a current song which was undoubtedly responsible for most of the sales of the double record, the Second Circuit Court of Appeals allowed the plaintiff 100% of the profits made from the sale of the entire record. This judgment is equivalent to 200% or 300% of the profits possibly attributable to the infringement. Yet, the U. S. Supreme Court denied certiorari 304 U. S. 572, 58 Sup. Ct. 1040, 82 L. Ed. 1536.

In the instant case there was no evidence to sustain an apportionment of profits—on the contrary, the uncontradicted evidence was that the profits could *not* be apportioned. [Botsford, Tr. pp. 477-478; Geller, Tr. p. 271.]

We therefore submit neither the *Sheldon* nor the *Stone-sifer* cases are in point and plaintiff was entitled to an

*In the *Sheldon* case the plaintiffs testified they had agreed to sell the motion picture rights of their play "Dishonored Lady" for \$30,000 but the court awarded \$117,000. (309 U. S. 390, at 397.)

award of 100% of the profits. (See Cross-Appellants' Opening Brief, Point II, pp. 32-42.)*

Appellants cannot now contend they were robbed of the opportunity to offer evidence upon the very point upon which evidence was invited by the trial court and declined by them.

POINT IV.

The Court Is Not Precluded From Exercising Its Discretion to Award Statutory Damages Where Either Provable Damages Alone or Provable Profits Alone or Provable Damages Plus Profits Do Not Constitute a Fair and Just Award Under All the Circumstances of the Particular Case.

In *Fargo Mercantile v. Brechet*, 295 Fed. 823, the Eighth Circuit Court of Appeals stated what we believe to be the true rule, as follows (at p. 829):

"We think election to award what are known as statutory damages in lieu of actual damages vests with the Court and that it is for the Court to decide what kind of damages best fits the case. Exercising the authority given by the Statute the Court awarded Statutory damages. The practice is well established." (Citing *Waterman v. Dispatch Co.*, 249 U. S. 100.)

The Ninth Circuit Court of Appeals stated in *Turner & Dahnken v. Croxley*, 252 Fed. 749 at 754:

"The duty of the court was to award damages as justified by the nature and circumstances of the case as developed upon the trial."

*Both appellants now for the first time in this court ask for the opportunity of offering proof before a Master to support an apportionment (Universal's Reply Br. p. 17; Bruckman's Reply Br. p. 10). Both appellants were given full opportunity to offer such proof in the trial court: "You gentlemen are privileged to introduce all the expert testimony you desire" [Tr. p. 472]; "The Court: If there is any question about it, I will listen to any testimony you care to offer." [Tr. p. 474.]

The U. S. Supreme Court has repeatedly justified an award of statutory damages where actual damages or profits are difficult or uncertain of proof (*Douglas v. Cunningham*, 294 U. S. 209; *Westerman Co. v. Dispatch Printing Co.*, 49 U. S. 100.)

In the *Douglas* case the court expressly stated that "an award of statutory damages in the contemplation of the statute is just" (294 U. S. 209) and "shall not be regarded as a penalty." (*Brady v. Daley*, 175 U. S. 148.)

Only two cases are cited by appellants in opposition to the rule that discretion vested in the court as stated by this court in *Dahnken v. Crowley*, 252 Fed. 749.

Those two cases are *Davilla v. Brunswick-Balke-Colander*, 94 F. (2d) 567 and *Sheldon v. Metro-Goldwyn Pictures Corp.*, 309 U. S. 390.

In the *Davilla* case *supra*, the court held that an award of 100% of the profits was adequate compensation where only one side of a double phonograph record constituted infringement and it was doubtful whether the copyrighted number which had run its course, had been responsible for the sale of the record.

In the *Sheldon* case *supra*, the court obviously felt that an award of \$117,000 to plaintiffs who had been willing to accept \$30,000 for the motion picture rights to their property, was adequate compensation.

In *neither* case were damages pleaded or proven and in *neither* case could the plaintiff be injured by an award which was in fact many times larger than any possible damages actually sustained. We concede that the Supreme Court in the *Sheldon* case did state that the "in lieu" clause was inapplicable "as the profits have been proved and the only question is as to their apportionment" (309 U. S. 390) but we earnestly submit that *neither party* contended that statutory damages should be substituted in lieu of

profits because one party argued that plaintiff was entitled to 100% of the profits without apportionment and the other party argued that the profits should be apportioned.

If the provable profits had aggregated only \$1,000 instead of \$560,000 and plaintiffs had asked for an award of statutory damages in lieu of actual damages and profits, the question might be said to have been fairly before the Supreme Court for decision. We cannot conceive that the Supreme Court would preclude itself or any other court from awarding statutory damages if under the nature and circumstances of the case such course should be necessary to achieve a just result.

In this connection it is significant that appellants have utterly failed to comment upon the case of *Burndy Engineering Co. Inc. v. Sheldon Service Corp.*, 127 F. (2d) 661, 53 U. S. P. Q. 409, which was referred to in our cross-appellant's opening brief (p. 43). In that case—which was decided April 29, 1942—more than two years after the U. S. Supreme Court decision in *Sheldon v. Metro-Goldwyn Corp.*, *supra*—the Second Circuit Court of Appeals expressly held that it was a proper exercise of discretion to award \$3,500 statutory damages in lieu of \$1,194.60 profits found by the Special Master appointed by the trial court. The opinion of the trial court is reported in 39 F. Supp. 274, 50 U. S. P. Q. 24, where the District Court stated:

“As pointed out in *Westermann Co. v. Dispatch Printing Co.*, 249 U. S. 100, the court may in the exercise of its sound discretion allow statutory damages pursuant to Section 25 of the Copyright Act where actual damages cannot be proved in terms of dollars and cents. These principles were also discussed at length in *Sebring Pottery Co. v. Steubenville Pottery Co.*, 9 F. Supp. 384. The apparent reason for the statutory provision was to care for the situation where actual proof of profits or damages

was difficult. (Cf. *Douglas v. Cunningham*, 294 U. S. 207 (24 U. S. P. Q. 153).)”

The Circuit Court of Appeals affirmed the judgment of the trial court upon the following grounds:

“ . . . An award of statutory damages was the proper course to adopt where the accurate proof of profits or damages was impossible. The use of the infringing catalogs built up defendant’s good will and imperiled plaintiffs to an incommensurable extent not reflected in current profits.” (127 F. (2d) 661.)

It should be noted that in the *Burndy* case the special master specifically found the amount of profits derived from certain sales to customers who ordered directly from the infringing catalog. The special master also found specific profits derived from the sale of goods described in the infringing catalog but ordered by customers without specific reference to the catalogs. If the contention of appellants is correct that proof positive of profits *precludes* a court from awarding statutory damages neither the trial nor Appellate Court would have been able to exercise any discretion as to whether profits or statutory damages constituted the appropriate remedy.

The Second Circuit Court of Appeals, however, did not hesitate to sustain the award of statutory damages upon the same underlying theory expressed by this court in *Turner & Dahnken v. Crowley*, 252 Fed. 749; by the Fourth Circuit Court of Appeals in *No-Leak-O-Piston Ring Co. v. Norris*, 277 Fed. 951; by the Eighth Circuit Court of Appeals in *Fargo Merc. Co. v. Brechet*, 295 Fed. 823, 829; and by the U. S. Supreme Court in *Westermann Co. v. Dispatch Printing Co.*, 249 U. S. 100, 39 S. Ct. 194, 63 L. Ed. 499, and *Douglas v. Cunningham*, 294 U. S. 207, 55 S. Ct. 365, 79 L. Ed. 862.

POINT V.

Appellant Universal Errs in Contending That the “Reasonable Royalty” Rule in Patent Cases “Is Only Applicable When Neither Damages Nor Profits Can Be Calculated With Reasonable Certainty.”
(Universal’s Reply Br. p. 10.)

Appellant Universal cites *Widenski v. Shapiro, Bernstein & Co.*, 147 F. (2d) 909 (First C. C. A.), as holding that the statutory damages of the Copyright Act are “a *substitute* for the established or reasonable royalty rule applied in patent cases.” (Universal’s Reply Brief, p. 9, Appendix, p. iii.) It is evident from the next sentence following the portion quoted by Universal that the court did not consider statutory damages as the *equivalent* of the reasonable royalty rule nor did it consider all patent rules and remedies applicable to copyright causes, for the court states at page 911:

“It seems to us highly significant that we have been referred to and have found no cases applying the patent rule contended for by the defendant in a copyright case.” (147 F. (2d) 909 at 911.)

There is a fundamental difference between royalties based upon a stated royalty for each article manufactured and a copyrighted motion picture of which no more than 200 or 300 positive prints are manufactured but never sold. The motion picture producer licenses a temporary use of a positive print by an exhibitor who never acquires any ownership of the print but must return it to a film distributing exchange which re-licenses the same print to subsequent exhibitors until the entire field is exhausted. No reasonable royalty can be predicated upon the number of positive prints manufactured. The “substitute” of the Copyright Act is a statutory schedule of \$100 for the first infringing performance and \$50 for each subsequent in-

fringing performance. The necessity for some such statutory schedule is evident when it is realized that an infringer who pirates a dramatic or literary work may produce it so badly that he may derive small profits or none at all but even the poorest reproduction of a copyrighted work will deprive the copyright proprietor of much of the value of his property and will preclude him from himself presenting the same work to the public.

Even assuming that statutory damages in copyright cases are completely analogous, however, defendant Universal is in error in contending that the "reasonable royalty" rule utilized in patent litigation is *only* applicable "when neither damages nor profits can be calculated with reasonable certainty." (Universal Reply Br. p. 10.) None of the cases cited by Universal with the possible exception of *Krentler-Arnold Hinge Last Co. v. Leman*, 24 F. (2d) 423 (a trial court decision), support its position, and the Kentler case has been subsequently disapproved as we shall hereafter show. All of defendants' cases involved factual situations where *neither* damages *nor* profits were proved, and the language used by the courts must be construed in the light of the peculiar facts involved.

Wherever the express problem involved in the instant litigation was presented to a court the decision was contrary to Universal's contention. In *Mathey v. United Shoe Machinery Corp.*, 54 F. Supp. 694, the specific point before the court was whether it was proper to apply the reasonable royalty rule where it was clearly proved that the *defendant's profits from the infringement amounted to \$15,525.98*. It was contended that profits being clearly shown, plaintiff could not recover except under such a basis and was not entitled to damages based on reasonable royalty. The court held to the contrary and awarded plaintiff *damages in excess of \$70,000 and increased the award 50% for wilful infringement*, stating at page 697 [see Appendix i].

In *Austin & Western Railroad Machinery Co. v. Disc Grader & Plow Co.*, 291 Fed. 301, the same point was raised and decided adversely to defendant Universal's contention, the court saying:

"The contention that 'the judgment should be reversed, because it exceeds the actual total profit made by defendant' is clearly without merit. A reasonable royalty is a measure of damages and is *recoverable without respect to profits*. (Citations.)"

In *Goodyear Tire Co. v. Overland Cushion Tire Co.*, 95 F. (2d) 978 (cert. dis. 306 U. S. 665), cited by Universal (Rep. Br. p. 5) the Court gave plaintiff the *alternative* of recovering either the defendant's profits from the infringement *or* damages based on a reasonable royalty and pointed out that in other litigation between the same parties damages based on a reasonable royalty were found to be \$549,-410, which amount was *doubled* by the Court. In commenting on this the Court said:

"Plaintiff elected to take the double damage awarded *in lieu of* the subsidiary's profits which amounted to \$187,113.69" (at p. 983).

In *K. W. Ignition Co. v. Tempco Elec. Motor Co.* (6th C. C. A.), 283 Fed. 873, the defendant's profits were shown to be \$164,431.54. These profits were awarded to the plaintiff, and the trial court added \$50,000 to the award. The Circuit Court of Appeals for the Sixth Circuit upon a cross-appeal awarded the plaintiff damages on the basis of a reasonable royalty of \$2.00 for each infringing sale and *increased the added award from \$50,000 to \$100,000*.

In *American Tel. & Tel. Co. v. Radio Audion Co.*, 5 F. (2d) 538, the court awarded plaintiff damages based on a reasonable royalty, *although defendant's lesser profits from the infringement were shown*.

In *Lee v. Malleable Iron Co.*, 247 Fed. 795 (modified on interest point, 263 Fed. 896; cert. denied 251 U. S. 562), the defendant was clearly shown to have made some \$47,000 in profits from the infringement. The court awarded damages on a reasonable royalty basis of \$78,-816.67, \$12,282.26 interest, and \$15,763.33 by way of a 20% increase or a total of \$106,862.26. In answering the same contention made by defendants herein, the court said [see Appendix p. ii].

See also:

Dental Vulcanite Co. v. Van Antwerp, Fed. Cas. No. 5600;

Consolidated Rubber Tire Co. v. Diamond Rubber Co., 226 Fed. 455 (aff'd 232 F. 475).

Defendant Universal's attempt to limit the plaintiff's recovery for *damages* because of the fact that it made small profits only, cannot be justified. Its argument in effect disregards the fact that reasonable royalties (in patent litigation) and statutory damages (in copyright litigation) are utilized in determining the extent of a plaintiff's damage only, and the amount, if any, of defendant's profits have no bearing whatsoever upon the right of a plaintiff to recover in an action at law for damages. (See *Walker on Patents* (Deller's Ed. 1937), p. 2152 *et seq.*, where the distinction between an action at law for damages and an action in equity to recover profits is clearly pointed out.)

In *Birdell v. Denig*, 95 U. S. 716 at p. 720, the court said:

"Profits are not the primary or true criterion of damages for infringement in an action at law."

Sammons v. Colonial Press, 126 F. (2d) 341 at p. 345:

“The profits which were made by the infringer may bear no relation to the damages suffered by the copyright proprietor.”

Even the reasonable royalty rule in patent cases is a measure of damages and has no application in an action at equity to recover the infringer's profits (*Walker on Patents* (Deller's Ed. 1937), pp. 2170 *et seq.*).

Defendant Universal's contention (Rep. Br. p. 17), that the plaintiff's recovery “should be nominal” is absurd.*

Conclusion.

This is the first copyright infringement action to reach an Appellate Court where the plaintiff's copyrighted motion picture was proven to have an intrinsic value of several hundred thousand dollars. In the *Sheldon* case the Second Circuit Court of Appeals and the U. S. Supreme Court did not hesitate to award \$117,000 to the authors of a copyrighted play, who valued their motion picture rights at \$30,000. If the same test of four times the value be made the basis of an award here, plaintiff here would be en-

*In *Enterprise Mfg. Co. v. Shakespeare Co.*, 141 F. (2d) 916, the same contention in a patent action was made and the court said:

“The argument of appellee that the improvement disclosed in the patent under consideration was without value or of only nominal value, was rightly rejected. The appellee, by infringing use, has paid tribute to the utility of the device infringed. As was said by Judge Hickenlooper for this court, in *Seymour v. Ford Motor Co.* (6th Cir.), 44 F. (2d) 306, 308:

“The patent is itself evidence of such utility, and the use of the patented device by the defendant has been recognized as an admission of this fact, and as creating an estoppel upon the defendant to deny such utility. (Citing numerous cases.)”

titled to receive approximately one million dollars. An award of \$40,000 is completely inadequate and out of line with the values placed by the motion picture industry upon its own properties and such a judgment merely amounts to an invitation to plagiarize a copyrighted motion picture upon the theory that it is cheaper to steal the property than to purchase it.

If the intent and purpose of the Copyright Act is to be realized, then deliberate infringers should be advised by the judgment of this Court that unauthorized use of copyrighted material must be paid for at least to the same extent as if purchased from and used with the consent of the copyright proprietor. Any other decision simply condones deliberate piracy and encourages any motion picture producer to steal anything he wants in the hope that he can escape at least a portion of the payment which would otherwise be required by the copyright proprietor.

We submit this Court should finally determine the controversy between the parties by doing one of the following things:

1. Increase the award of actual damages to \$250,000 and/or award all of the profits to the plaintiff, or
2. "In lieu of" actual damages and profits, award the plaintiff statutory damages upon the basis of 30,000 infringing performances by defendants in 6636 theaters throughout the country.

Respectfully submitted,

HAROLD A. FENDLER,

Attorney for Cross-Appellant Harold Lloyd Corporation.



APPENDIX.

(P. 16.) *Mathey v. United Shoe Machinery Corp.*, 54 Fed. Supp. 694 at page 697 :

“Objections 8, 9, 10, 15, 24, and 34 are directed to the proposition that ‘in so far as the master’s award is based upon “reasonable royalty”, it is erroneous because (a) an award based on any theory of “reasonable royalty” is not allowable when, as here, defendant’s profits are ascertainable; and (b) because the rate of the master’s award is unreasonable’.

“To support its contention that the maximum recovery to which the plaintiff is entitled in this equity proceeding is the defendant’s profits as stated in its account, the defendant relies upon the case of *Krentler-Arnold Hinge Last Co. v. Leman*, D. C. Mass., 24 F. 2d 423. The court in the *Krentler* case stated, page 425 of 24 F. 2d:

“‘By the terms of the statute general damages can be awarded only when neither profits nor damages can be proved’. I find myself in disagreement with this statement of the law if it means that if the defendant can prove his profits as was done in the *Krentler* case, the plaintiff must accept them as the measure of his damages.

* * * * *

“Further, in accordance with the terms of the statute, 35 U. S. C. A. Sec. 70, if it appears that *either* the actual damages of the patentee—such as profits on lost sales or reduced profits—*or* the profits of the infringer are not susceptible of calculation with reasonable certainty, the court upon the evidence may award a reasonable sum as

general damages which may be determined by opinion evidence or fixed by way of a reasonable royalty when there is no established royalty. It follows from what has been said that if the patentee elects to pursue damages and not profits, and damages are not susceptible of calculation with reasonable certainty, the plaintiff may be awarded general damages or reasonable royalty, whether or not the defendant's profits are ascertainable. In the case of *Goodyear Tire & Rubber Co. v. Overman Cushion Tire Co.*, *supra*, 95 F. 2d at page 983, the plaintiff was allowed to elect whether he would recover upon the basis of reasonable royalty where the actual damages could not be proved *or* take the infringer's profits which were definitely ascertained by the master. Cf. *Overman Cushion Tire Co. v. Goodyear Tire & Rubber Co.*, 2 Cir. 66 F. 2d 361, where it seemed the profits were ascertained and the exact amount of damages could not be proved (66 F. 2d at page 361), the plaintiff was allowed reasonable royalty.

"If the principle of law the defendant contends for was correct, i. e., that the maximum recovery to which the plaintiff is entitled, is the defendant's profits on the infringing business, it would lead to very harsh results. If an infringer could limit his liability by keeping his profits at an inconsequential figure by low competitive rates and at the same time keep an accurate account of his low profits, small competitors would be at his mercy where a patent was only of temporary substantial value. This contention of the defendant is without merit."

(P. 18.) *Lee v. Malleable Iron Co.*, 247 Fed. 795:

“Wherefore the fact that defendant is shown to have made \$47,000 ‘profits’, apportioned as ‘legally attributable’ to the embodiment of the invention in the combination structures made by it, cannot limit the proofs in their legitimate tendency—as it may develop—to either a larger or smaller amount as reasonable royalty damage. True, profits actually made may be considered; but that their amount must be taken as the test of reasonableness, or that profitless infringing must negative damage by defeating the exaction of a reasonable royalty by a patentee, is no more possible in measuring damages in respect of infringement, than would be the attempt of a lessee at will or sufferance to limit or defeat reasonable recovery by proving his occupation of the tenement to have resulted in little or no profit to him.” (247 Fed. at 806.)

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Appellant Bruckman's Reply to Brief for Appellee,
Harold Lloyd Corporation.

DEC 14 1946

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Appellant Bruckman's Reply to Brief for Appellee,
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Statement.

Unable to point out anything wrong with our Statement of the Case, appellee's counsel undertakes to characterize our Statement as "merely a highly colored argument." (Appellee's Br. p. 13.) This characterization, if we may say so, is mere *brutum fulmen*. Our Statement is, of course, not "merely a highly colored argument." Indeed, it is not an argument at all except in the sense that any fair and adequate statement of the case on appeal is, as Justice Field long ago expressed it, "more than

half the argument.” In any event, our “Statement of the Case” stands unchallenged.

It is unnecessary to restate the facts or again argue the law at length.

Inasmuch, however, as appellee by weaving in, about, and around, has managed to keep itself at arm’s length from both the facts and the law, we believe it is well, first, to summarize the controlling facts, next to catalogue appellee’s admissions by silence and acquiescence, its express admissions, and its contentions relative to the facts, and then summarize the controlling authorities, show that appellee has not met them and that the affirmative portions of appellee’s brief are unsound.

This may, we trust, make it a bit clearer than it already is that the judgment must be reversed:

1. Unless the copyright monopoly given to dramatic compositions by Section 1(d) of the Copyright Act is to be enlarged so as to include mere burlesque consisting of six or eight gags and pieces of stage business, even though such burlesque is in the public domain, is not an integral part of “Movie Crazy,” and “Movie Crazy” as a whole (particularly the portions which are original), is not drama and the six or eight gags and pieces of stage business borrowed were used differently and to a different purpose in “So’s Your Uncle.”

2. Unless appellee is entitled to disregard the implied finding that all the expert testimony is false, the implied finding that there were no general damages, and the express finding fixing special damages in a lump sum for injury to appellee’s reissue and remake rights, without allocation, even though appellee’s remake rights are admittedly not within its copyright monopoly.

I.

The Controlling Facts.

A.

AS TO LIABILITY.

1. The magician's coat routine in "Movie Crazy" does not portray life or tell a story. (Our Op. Br. pp. 9, 10, 49-57.)

2. The magician's coat routine is not an integral part of "Movie Crazy" as a whole (in so far as it has a story), because the routine does not advance or impede Harold in getting a job. (Our Op. Br. pp. 12, 17, 24, 37.)

3. The "story" and the story incidents in "Movie Crazy" are borrowed from "Small Town Idol," "Extra Girl," and "Merton of the Movies." (Our Op. Br. pp. 22, 23.)

4. The comedy routines in "Movie Crazy," including the magician's coat routine, are all commonplace, i. e., in the public domain. (Our Op. Br. pp. 17-26; 37-49.)

5. The only originality in the magician's coat routine, or in "Movie Crazy" as a whole, is in the particular combination of gags and pieces of stage business,* and the

*It may be pointed out that we have used the phraseology "gags and stage business" in the same sense in which it is used by Lloyd himself and by this and other American courts, the protestations in Appellee's Brief to the contrary notwithstanding. (Appellee's Brief pp. 44-52.) Lloyd testified:

"Q. You have spoken upon occasions about what you have termed 'gags' in these pictures that you have made. Just what do you mean by the use of the term 'gags'? How would you define that term? A. I will define it in a comedy scene in the particular sequence we are talking about, where the comedy scene is where the waiter brings in the plate with a cover

order in which they appear. (Our Op. Br. pp. 9, 10, 17-27, 37.)

over it and the rabbit inside. The actual gag is where the man lifts off the cover and sees the rabbit and thinks he has snakes or something. Another one could be where they stop and are introduced to another party and the actual squirting out of the water is the gag itself. Q. So that each of those pieces—those are really what you call 'pieces of business,' Mr. Lloyd, pieces of comedy business? A. They are gags within a comedy scene and these comedy scenes make up the whole sequence. Q. Oh, each one considered separately, then, you define as a gag? A. The actual happening is the gag, the little—. [Tr. pp. 136-137.]

In *Harold Lloyd Corporation v. Witwer*, 9 Cir. (1933), 65 Fed. 2d 1, one of the writers of the Harold Lloyd Corporation, produced by that Corporation, testified as follows:

"That was the first sequence, you understand, and gags were to be hung on that. * * * and there was to be a routine of gags at the station, showing the college atmosphere, such as slapping the dean of the college on the back and riding off in his car by mistake and such things as that." (p. 10.)

On the basis of this testimony, the court commented:

"Consequently there was no effort to reproduce some such humorous situation in the story, but the purpose was to create a separate distinct sequence in the case of each gag to produce laughter on the part of the audience." (p. 10.)

The court also made the following comment:

"This inchoate plan, antedating all contact with Witwer or his story, necessarily involved the use of Harold Lloyd as the hero of the play and experiences which he would have in attending college, and numerous gags in accordance with the general set-up of all the Lloyd plays." (p. 16.)

In *Bloom & Hamlin v. Nixon*, C. C. E. D. Pa. (1903), 125 Fed. 977, the court referred to "the rather striking impertinence" of making one of the audience uncomfortable by singling him out and singing to him, as "stage business." (Our Op. Br. p. 57.)

In *Tate v. Fullbrook* (1908), 1 King's Bench Division 821 (Court of Appeal) the court referred to "comic business" consisting of a cracker being placed by a street urchin under and exploded by the foot of one of the characters, and also says, "expressions were introduced into the defendant's piece by way of 'gag' which had been taken from similar 'gag' in the plaintiff's piece as performed." (Our Op. Br. p. 57.)

In short, while gags and stage business are differentiated in the English case, Lloyd's testimony and the American cases use the term "gag" as including both "expressions" as well as acts.

6. The only similarities in "Movie Crazy" and "So's Your Uncle" are in six or eight gags and pieces of stage business in the magician's coat routines and the order in which they appear. (Our Op. Br. pp. 9, 10, 13, 14, 15.)

7. These six or eight gags and pieces of stage business are used differently in the two pictures:

(a) There is no similiarity between the story in "So's Your Uncle" and the story in "Movie Crazy," in so far as it has a story.

(b) The ages, appearances, and costumes of Steve and Harold, and the dialogues, are altogether different.

(c) The characters of Harold and Steve are altogether different.

(1) Harold is a stupid, timid, and unsophisticated country boy, while Steve is an independent, self-assured, and brash man of the world.

(2) Harold has a genius for making grotesque mistakes which recoil on him to his own embarrassment, while Steve uses bold and cheeky stratagems by which he overcomes every difficulty.

(d) There is no resemblance between the characters in the two routines, other than Harold and Steve.

(e) In "Movie Crazy" there is no character corresponding to Joe in "So's Your Uncle." (Our Op. Br. pp. 15, 16.)

8. The six or eight gags in question are used to an altogether different purpose in the two pictures:

(a) In "Movie Crazy" the routine is built entirely around embarrassment to Harold and resulting sympathy for him. Harold gains admittance to the dinner dance, which is a private party, by mistake; he gets into the magician's coat by mistake; he makes his dancing partner the butt of his gags and stage business; he gets his face slapped; he is unmasked by the magician; mistake of the invitation is discovered; and he is literally thrown out.

(b) In "So's Your Uncle" Steve goes to the night club rightfully; Joe gets the magician's coat for Steve, knowing it is a magician's coat; members of Steve's party are not victims of the gags and stage business; Joe gets the blame; and Steve emerges triumphant, with increased prestige with Pat. (Our Op. Br. p. 16.)

B.

AS TO DAMAGES.

(a) There is no direct evidence as to damages, and no relevant data from which it can be inferred, other than the testimony of expert witnesses. (Our Op. Br. pp. 28-34.)

(b) The trial court expressly stated it disbelieved all the expert witnesses. (Our Op. Br. p. 33; Tr. p. 522.)

(c) There is an implied finding that all of the testimony of the expert witnesses is untrue. (Our Op. Br. p. 63; see also our Brief on Cross-Appeal, pp. 3-4.)

(d) No evidence was presented as to general damages. (Our Op. Br. pp. 28-34.)

(e) There is an implied finding that there were no general damages. (Our Op. Br. p. 63; Tr. p. 36.)

(f) The findings fix special damages in a lump sum, without allocation for damage to reissue and remake rights. (Our Op. Br. p. 7.)

(g) The finding of special damages in the sum of \$40,000.00 was in turn based on the finding that appellants copied 57 consecutive scenes, including "characters, characterization, motivation, treatment, action and sequence of action," and the latter findings were contrary to the evidence. (Appellee's Br. p. 27; Our Op. Br. pp. 9-28; *Infra* # 2(b).)

II.

Controlling Facts Not Met.

1. Appellee admits:

(a) That the "story" and story incidents in "Movie Crazy" are borrowed from "Small Town Idol," "Extra Girl," and "Merton of the Movies." (*Ante*, IA, par. 3.)

(b) That the comedy routines in "Movie Crazy," including the magician's coat sequence, are commonplace, that is, in the public domain. (*Ante*, IA, par. 4.)

(c) That the only originality in the magician's coat routine, or in "Movie Crazy" as a whole, is in the particular combination of gags and stage business, and the order in which the gags and stage business appear. (*Ante*, IA, par. 5.)

(a) above is admitted by silence and acquiescence;

(b) and (c) above are expressly admitted. (Appellee's Brief, p. 31.)

2. Appellee denies:

(a) That the only similarities in "Movie Crazy" and "So's Your Uncle" are in six or eight gags or pieces of stage business and the order in which they appear. (*Ante*, IA, par. 6.)

(b) That these six or eight gags and pieces of stage business are used differently, or to a different purpose, in the two pictures. (*Ante*, IA, pars. 7 and 8.)

Appellee relies on the findings "that 57 consecutive scenes (1000 continuous feet of film in the seventh and eighth reels consisting of approximately 20% of plaintiff's motion picture photoplay) had been 'knowingly, wilfully and deliberately copied, misappropriated, and plagiarized by defendants,' 'including characters, characterization, motivation, treatment, action and sequence of action.' " (Appellee's Br. p. 27.)

But these findings are contrary to the evidence.

The direct evidence is summarized in our Opening Brief as follows:

"At the time 'So's Your Uncle' was in preparation by Universal, Bruckman was employed as a gag writer. Bruckman never heard of 'So's Your Uncle' until the scenario had been completed. As completed [i. e., before Bruckman heard of it] the scenario had a dance sequence at a night club, in which Steve, the hero, appeared both as his uncle and in his own character. [Tr. pp. 231, 235.] Mr. Yarbrough, the producer, handed Bruckman the scenario, saying he needed some comedy in the dance sequence. [Tr. p. 236.] He did not tell Bruckman what comedy material to introduce. [Tr. p. 236.] Bruckman typed up comedy material consisting

of stage business connected with the magician's coat sequence, which later appeared in the picture as released. [Tr. p. 229.] He brought this to Yarbrough's attention. * * * Yarbrough handed the typewritten material prepared by Bruckman to Maurice Leo [the] scenario writer, for inclusion in the scenario. [Tr. p. 229.] Asked by plaintiff's counsel as to his conversation with Yarbrough, Leo testified 'The substance was that he brought this material, * * * and he thought it would work very well into our night club sequence; and he gave it to me and I looked at it and, if I am not mistaken, I was not too enthusiastic over it because I thought it was dated and old-fashioned; but he seemed to think that, despite that fact, he wanted to use it and he was the producer and so I used it. [Tr. p. 221.]" (Our Op. Br. p. 27.)

Leo, who was a disinterested witness called by appellee, expressly testified that at the time Yarbrough handed him Bruckman's material, the scenario already showed that the hero knew he would have to appear at the night club both as a young man and the uncle, and also showed the hero going into the washroom and taking the coat of the washroom attendant in order to masquerade as the uncle. [Tr. p. 228.] At the request of appellee's counsel, Leo produced the scenario as he had prepared it before the inclusion of the gags and stage business, but the document was not offered in evidence. [Tr. pp. 214-215, 218.] Leo testified that he had never met Bruckman [Tr. p. 219], and that he had no recollection of ever having seen "Movie Crazy." [Tr. p. 226.]

No inference adverse to this direct testimony is justified from a comparison of the two pictures.

Appellee asks the Court to compare "Plaintiff's Ex. 3, copy of the continuity and dialogue of 'So's Your Uncle', Reel 4, pp. 1-9, incl., Scenes 1 to 57, incl., with Plaintiff's Ex. 5, continuity and dialogue of 'Movie Crazy,' Reel 7, Scenes 22-25, pp. 6-8; Reel 8, Scenes 1-57, pp. 1-10, incl." (Appellee's Br. pp. 27-28.)

Not only would such comparison yield nothing, but the so-called Exhibit 5 is not even in evidence; it was merely marked for identification. [Tr. p. 349.] Appellee, however, undertakes to make the comparison on the basis of the Exhibit and the Exhibit for identification, in his Appendix II entitled "The Deadly Parallel," at pages 19-25.

"The Deadly Parallel" hoists appellee on his own petard.

"The Deadly Parallel" shows that the only materials borrowed were (1) the hero dancing in a magician's coat; (2) a miniature clothes line being pulled out of the hero's coat as it is caught on a woman's dress; (3) a dove flying out of the hero's coat; (4) the hero squirting water into a woman's face from a boutonniere on the lapel of his coat; (5) the hero pulling a white rabbit from his coat, placing it on a serving dish, placing a cover over it, and having it served to a man, and the man's reactions; (6) the hero slipping an egg from his sleeve, and observing a man trying to kill a fly near his head, the hero placing the egg in the man's hand, and the man smashing the egg on his head thinking he is killing a fly; (7) a mouse climbing on the hero's shoulder, which causes women to scream; and (8) the hero pulling a box of mice out of his coat, dropping it on the floor, letting

the mice loose among the dancers, and thereby causing pandemonium.

Inasmuch as appellee castigates our co-appellant unmercifully for asserting that the appeal “is from a judgment * * * holding that plaintiff’s copyright * * * has been *infringed by the use of six gags or pieces of stage business used in a comedy routine in the motion picture of defendant Universal*” (Italics are appellee’s) (Appellee’s Br. p. 2), it is, perhaps, not too unkind to suggest that appellee and its “deadly parallel” remind one of the old Mountain that labored and brought forth a mouse.

3. Appellee denies:

That the magician’s coat comedy routine does not portray life or tell a story. (*Ante*, IA, par. 1.)

In that behalf appellee states our position as follows:

“Both appellants strongly urge that the sequence in question is not protectible under the Copyright Laws because it consists merely of isolated ‘gags,’ ‘stage business,’ ‘clowning,’ and ‘sleight-of-hand tricks’ which constitute ‘grotesque, hobbledohoy’ and which do not contain ‘a thread of consecutively related events.’ ” (Appellee’s Br. p. 27.)

Appellee then makes the dogmatic assertion:

“We submit that a bare inspection of the sequence in question answers appellant’s arguments.” (Appellee’s Br. p. 27.)

Appellee then complains that “Appellant Bruckman attempts to minimize the misappropriation by a reduction to thirty-three lines.” (Appellee’s Br. p. 28.) But appellee does not challenge the accuracy of the subdivision of our Statement of the Case referred to by him, which is en-

titled "Plaintiff's Comely Routine" (Our Op. Br. pp. 9-10). This subdivision is a fair and accurate account of the scene at the dinner dance and shows that that scene does not portray life or tell a story but, on the contrary, is made up of isolated gags, stage business, clowning and sleight-of-hand tricks which constitute grotesque hobbledoy. In short, that the scene is burlesque, and nothing but burlesque.

The column of appellee's "deadly parallel" which relates to "Movie Crazy" shows the same thing. (Appellee's Br., Appendix II, pp. 19-25.)

4. Appellee denies:

That the magician's coat sequence is not an integral part of the story in "Movie Crazy." (*Ante*, IA, par. 2.)

In that behalf appellee relies on the testimony of Lloyd. We quote from Appellee's Brief:

"Lloyd's evidence was that 'the whole sequence is naturally tied into the story; it is the heart of our story and without that particular sequence tied into it the story is certainly destroyed'; that the sequence is an 'integral and essential part of the story and plot' of 'Movie Crazy' and 'plays a functional part in the development of the picture.'" (Appellee's Br. p. 29.)

The testimony was received over our objections. [Tr. p. 138.]

Adler, who was not in the employ of Universal, on cross-examination by appellee's counsel, testified to the contrary. [Tr. p. 332.]

Hirleman, another disinterested witness, testified that in his opinion the sequence showing the dinner dance was not an integral part of "Movie Crazy" because:

"Harold Lloyd does not meet with the head of the studio, which would have made good sense at the end of the story, and when he promotes him and gives him the job he doesn't even know about it; it could be left out of the picture but he could still be rewarded at the end and get his job and so forth and nobody would ever know whether that was in there or not; there is nothing connected with that sequence with what was going on between Harold Lloyd and the producer; nothing to show the wife ever told the producer and the producer ever found it out." [Tr. pp. 447-448.]

Not only is Lloyd contradicted by disinterested witnesses, but, in addition, the manner in which Lloyd's testimony was elicited really destroys the testimony:

"Q. (By Mr. Fendler): Is there any relationship to the story of the gags of the comedy scenes in Movie Crazy? A. The whole sequence is naturally tied into the story. It is the heart of the story, and without that particular sequence tied into it the story is certainly destroyed.

* * * * *

Q. Is that an integral and essential part of the story and plot of Movie Crazy? A. Yes, it is.

Q. And does it play a functional part in the development of the picture? A. In my opinion, it does." [Tr. pp. 137-139.]

It will be observed that counsel in his questions uses the phraseology used in the authorities relied on by us as to

the objective criteria for determining whether the borrowing was substantial (Our Op. Br. pp. 44-45; *infra* III, par. 9), and Lloyd conveniently undertakes to decide the case in his favor by applying these criteria.

But apart from all this, Lloyd's testimony was clearly inadmissible, and is entitled to no weight whatever, because the question whether a comedy routine is an integral part of a story is not the subject of opinion evidence but is a question which the Court must decide from its own examination of the document.

13 *Corpus Juris* 1215;

18 *Corp. Juris* Sec. 271;

West Publishing Co. v. Edward Thompson Company, C. C. E. D. N. Y. (1909), 169 Fed. 833;

West Publishing Company v. Lawyers Co-op. Pub. Co., 2 Cir. (1897), 79 Fed. 756;

Simonton v. Gordon, D. C. S. D. N. Y. (1924), 297 Fed. 625.

Appellee really concedes the point when he says, referring to the dinner dance scene:

"the career of the young hero is not affected adversely by his confusion and embarrassment at the night club [*sic.*] and eventually plaintiff's actor gets his long-wanted contract to act." (Appellee's Br. p. 29.)

This is obviously the fact. It clearly follows that the gags and stage business borrowed, or for that matter the entire dinner dance scene, was not an integral part of "Movie Crazy" as a whole because it neither advanced nor impeded Harold in getting a job. (See our Op. Br. pp. 12, 17, 24, 37.) A scene at the apartment of Mary, or

at a railroad station, might as well have been inserted as the dinner dance scene; Harold might as well have been shown as a makebelieve magician, drawing intoxicating liquor from a water jug as in *Glaser v. Hoffman* (1943), 159 Fla. 809 (our Op. Br. pp. 44-45); or Harold might have been shown losing parts of his clothing, or doing one or another of the thousands of gags or pieces of stage business which the testimony shows all comedians do. [Tr. p. 338; our Op. Br. p. 36.]

III.

Controlling Authorities.

The controlling authorities are:

1. *Seltzer v. Sunbrook*, D. C. S. D. Calif. (1938), 22 Fed. Supp. 621, cited with approval in *Corcoran v. Montgomery Ward & Co.*, 9 Cir. (1941), 121 Fed. 2d 572. (Our Op. Br. pp. 50-52.)

(Holding that entertainment is not dramatic composition within the protection of Subdivision (d) of Section 1 of the Copyright Act, unless it tells a story, *i. e.*, "a thread of consecutively related events." (22 Fed. Supp. pp. 628-629).)

2. *Harold Lloyd Corporation v. Witwer*, 9 Cir. (1933), 65 Fed 2d 1. (Our Op. Br. pp. 38-44, 59.)

(Holding that the only originality protected by copyright is originality in theme or story (65 Fed. 2d at p. 22); that a subordinate sequence, not an integral part of the story as a whole, is not protected by copyright (*id.* pp. 25-27); that borrowing commonplace materials and using them differently does not constitute infringement, and differences in appearance, name, and character of the heroes,

and the use to which the materials are put, are sufficient to negative infringement (*id.* at p. 28); and that no one, by presenting with modern incidents a plot which is common property, can appropriate it by copyright (*id.* at p. 24).

3. *Corcoran v. Montgomery Ward & Co.*, 9 Cir. (1941), 121 Fed. 2d 572 (certiorari denied 314 U. S. 687). (Our Op. Br. pp. 49-50.)

(Holding that action without a theme or story does not constitute dramatic composition.)

4. *Frankel v. Irwin*, D. C. S. D. N. Y. (1918), 34 Fed. 2d 142. (Our Op. Br. pp. 48-49, 58.)

(Holding "Farces, which, unless at least suggestive of genuine human thoughts, desires, and intents, are mere slapstick clowning." (34 Fed. 2d at p. 144.)

5. *American Mutoscope & Biograph Co. v. Edison Mfg. Co.*, C. C. N. J. (1905), 137 Fed. 262, cited with approval in *Harper Bros. v. Kalem Co.*, 2 Cir. (1909), 169 Fed. 61, 63. (Our Op. Br. pp. 55, 56.)

(Showing that a motion picture show made up of slapstick comedy and action which does not tell a story is copyrightable only as a photograph.)

6. *Glazer v. Hoffman* (1943), 153 Fla. 809, 16 So. (2d) 53, and *Professor Jacko v. The State* (1853), 22 Ala. 73. (Our. Op. Br. pp. 44-45, 52-53.)

(Holding that magicians' tricks, sleight-of-hand, conjuring, and clowning do not constitute drama.)

7. *Barnes v. Miner*, C. C. S. D. N. Y. (1903), 122 Fed. 480. (Our Op. Br. pp. 44, 45-46.)

(Holding that a vaudeville act, with motion picture accompaniment, showing changing of costumes and an order of events, is not drama.)

8. *Chappell & Co. v. Fields*, 2 Cir. (1914), 210 Fed. 864; *Bloom & Hamlin v. Nixon*, C. C. E. D. Pa. (1903), 125 Fed. 977; *Tate v. Thomas* (1921), 1 Chancery Division 503; *Tate v. Fullbrook* (1908), 1 King's Bench Div. 821 (Court of Appeal). (Our Op. Br. pp. 56-57.)

(Holding that gags and stage business are not within dramatic copyright.)

9. *Caruthers v. R. K. O. Radio Pictures*, D. C. S. D. N. Y. (1937), 20 Fed. Supp. 906; *Serrana v. Jefferson* (1888), C. C. S. D. N. Y., 33 Fed. 347. (Our Op. Br. pp. 44, 45.)

(Holding that comedy incidents are not within copyright protection unless they form an integral part of, or are intrinsic to the development of, and constitute links in, the chain of incidents which tell a story.)

10. *Curweed v. Affiliated Distributors*, S. D. N. Y. (1922), 283 Fed. 223; *Rush v. Oursler*, D. S. C. D. N. Y. (1930), 39 Fed. 2d 468. (Our Op. Br. pp. 47-48.)

(Holding there is no infringement where dramatic incidents are borrowed and are used in different settings, or are borrowed and a different solution is made of a mystery portrayed.)

IV.

Controlling Authorities Not Met.

Appellee passes in complete silence all of the controlling authorities (*ante* III), except *Harold Lloyd Corporation v. Witwer*, *supra* (*ante* III, 2), *Barnes v. Miner*, *supra* (*ante* III, 7), *Bloom & Hamlin v. Nixon*, *supra*, *Tate v. Thomas*, *supra*, and *Tate v. Fullbrook*, *supra* (*ante* III, 8), and *Serrana v. Jefferson*, *supra* (*ante* III, 9). Even *Seltzer v. Sunbrook*, *supra* (*ante* III, 1) and *Corcoran v. Montgomery Ward & Co.*, *supra* (*ante* III, 3), are not mentioned, although those cases decided in this Circuit, either with or without the other cases omitted by appellee, are themselves controlling.

(a) HAROLD LLOYD CORPORATION V. WITWER.

In the *Witwer* case there were two issues, first, whether the similarities between the motion picture and the novel overcame the positive testimony of the witnesses that there was no copying? and secondly, assuming there was copying, did the copying constitute infringement? Both issues were decided by this Court against appellee, who was plaintiff in the District Court.

The first issue was not discussed in our Opening Brief, and is only incidentally involved here. (See *ante* II, 2.) As to that issue, although the similarities were far more numerous than they are here, Judge Wilbur said:

“It is clear that there is no such similarity as overcomes the positive testimony that there was in fact no copying.” (65 Fed. 2d at p. 28.)

Appellee undertakes to claim, on the basis of two excerpts lifted from their context, that the *Witwer* case does

not hold that the only originality protected by copyright is originality in theme or story, and that borrowing commonplace materials and using them differently does not constitute infringement. (Appellee's Br. pp. 55-57.)

When the excerpts relied on by plaintiff are read in their context, it will be seen that they have no bearing at all on those points, but, on the contrary, relate solely to the first issue, namely, whether the similarities overcome the direct evidence that there was no copying.

The two excerpts in their context are as follows (the excerpts from Appellee's Brief (p. 57) being italicized):

"That there are similarities between the play and the story is manifest and we proceed to consider the legal significance of such similarities. *The primary question is whether these similarities resulted from copying the story*; if not, the similarities are without legal significance." (65 Fed. 2d at p. 4.)

"This inchoate plan, antedating all contact with Witwer or his story, necessarily involved the use of Harold Lloyd as the hero of the play and the experiences which he would have in attending college, and numerous gags in accordance with the general set-up of all the Lloyd plays.

"If all this be true, then *the question of infringement is narrowed to whether or not in the subsequent development of the play there was an intentional or unintentional appropriation of incidents and sequences and scenes* of the story not yet developed at the time of the conference between Witwer and Harold Lloyd in October, 1924, above referred to. This inquiry, however, involves a rejection of the testimony that these witnesses never knew or read the story, for without such knowledge there could be no

copying and their production would have been original no matter how closely it resembled the story.” (65 Fed. 2d at p. 16.)

Appellee also claims that it appears from the *Witwer* case, on the basis of the application of “the ordinary observer rule”, infringement has been proved (p. 56). Again, appellee fails to distinguish between the two issues in the *Witwer* case. Indeed, it is expressly held in the *Witwer* case that the ordinary observer rule relates only to the first issue in the case, and not the second issue. Thus it is said in the opinion:

“In the case at bar, if it be assumed that there are such similarities between the story and the play as to provoke in the casual observer the consciousness that there is such a similarity between them, and that copying may be inferred therefrom, we are still confronted with the fact that mere similarity does not necessarily involve literary piracy or an infringement of a copyright. Such similarities then as exist would require further analysis to determine whether or not they are novel in the story and thus copyrightable.” (65 Fed. 2d at p. 23.)

Appellee’s third point with reference to the *Witwer* case is that the term “subordinate sequence of events” as used in the case refers merely to a single episode (p. 55). Not only does the opinion in the case negative this (our Op. Br. pp. 39-44), but it is also negated by the brief of Harold Lloyd Corporation, who was appellant in that case and is appellee here.

In that brief the Harold Lloyd Corporation argued:

"2. Similarities do not constitute plagiarism unless they amount to an appropriation of matter which is protected by copyright and is substantial.

"The proposition stated in the heading, like the proposition last advanced, is supported by practically all the cases cited, particularly those at pp. 120-121 *supra*. The likenesses which have been considered in the decisions range from a single effect or episode, like the immersion scene in *Serrana v. Jefferson* (C. C. N. Y.), 33 Fed. 347, to the 455 alleged similarities on which the plaintiff unsuccessfully relied in *Lewys v. O'Neill* (S. D. N. Y.), 49 F. (2d) 603, 611." (Appellant's Brief in *Witwer* case, p. 147; see, also *id.* pp. 145-154.)

(b) BARNES V. MINER, SUPRA, BLOOM & HAMLIN V. NIXON, SUPRA, AND SERRANA V. JEFFERSON, SUPRA.

Appellee's only claim with reference to these cases is that they are distinguished in the opinion of Learned Hand, Circuit Judge, in *Sheldon v. Metro-Goldwyn Pictures Corporation*, 2 Cir. (1936), 81 Fed. 2d 49, 56. (Appellee's Brief pp. 45-47.) This is, however, not the case. All Judge Hand does is to point out that the cases in question do not hold that pantomime may not be dramatic (81 Fed. 2d at p. 55). That is, of course, beside the point here because pantomime tells a story and burlesque does not.

(c) ENGLISH CASES RELIED ON BY US.

Appellee argues that these cases, as well as other English cases, are of no aid to the Court because the language of the Copyright Act under which they were decided dif-

fers from the language of the United States Copyright Act, and also because the cases in question have been overruled by the passage of the British Copyright Act of 1911. (Appellee's Brief pp. 49-52.)

It is true that the language of the earlier English Copyright Acts restricted dramatic copyright to "something which can be printed and published." (Appellee's Brief p. 49.) That language, however, has been held by the English Courts to have substantially the same effect as the language of our own Copyright Act.

This appears from the opinion of Farwell, L. J., in *Tate v. Fullbrook*, *supra* (ante III, 8), from which we quote as follows:

"Nor do as I say that scenic effects may not be protected as part and parcel of the drama: scenes do of course form parts of drama, and it is the dramatic piece as a whole that is protected by the Act. It is essential, however, to such protection that there should be something in the nature of a dramatic entertainment, for a mere spectacle standing alone is no more within the Act than a singer who sings in character costume is in it." (1 King's Bench Division 821, at 832.)

The effect of the English Copyright Act of 1911 on the authority of the earlier cases in England is immaterial here because the English Act of 1911 is altogether different from the United States Copyright Act of 1909 as amended.

The matter is disposed of by the following from "Reflections on the Law of Copyright", by Zechariah Chafee, Jr. (1945), 45 *Columbia Law Review*, 403, 719:

"This ideal [a single monopoly] is embodied in the British statute.

"* * * 'copyright' means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatsoever". (p. 505.)

"The copyright law of the United States is quite different * * *" Legislators, lawyers, and judges have broken up this unified subject into a series of isolated monopolies and isolated remedies". (p. 515.)

See, also, *Corcoran v. Montgomery Ward & Co.*, *supra*, at page 574. (Our Opening Brief pp. 59-60.)

V.

Appellee's Affirmative Positions Unsound.

(a) "MOVIE CRAZY" AS A WHOLE.

In support of its claim that "Movie Crazy" as a whole (including the story and story incidents, which we have shown are in the public domain) is protected by dramatic copyright, appellee argues that Section 201.4 of the Copyright Office is not declaratory of the case law in so far as it declares that "motion picture shows" are not dramatic compositions; appellee also cites cases holding that exhibitors who "bicycle" film for exhibition in unauthorized theaters are guilty of infringement, and cases involving copying of comic strips which are not dramatic at all. Appellee's Brief pp. 24-26.)

(1) Appellee's argument with reference to Section 201.4 of the Code of the Copyright Office is as follows:

"Of course the reason the Copyright Office does not permit classification of a 'motion picture show' as a dramatic or dramatico-musical composition is that Section 5 specifies thirteen classes of applications for registration, of which classification '(d)' is 'dramatic or dramatico-musical compositions'; classification '(1)' is 'motion picture photoplays,' and classification '(m)' is 'motion pictures other than photoplays.'" (Appellee's Brief p. 26.)

The short answer to this is that subdivisions (1) and (m) of Section 5 did not become part of the Copyright Act until the revision of 1912, while section 201.4 of the Code of the Copyright Office was promulgated in 1910 as Rule 8 of the Copyright Office, amended in 1936, and carried into the present act as Section 201.4 in 1942.

Bowker, *Copyright. Its History and Its Law* (1912), p. 497;

Amdur, *Copyright Law and Practice*, (1936), p. 134;

Ball, *Law of Copyright and Literary Property* (1944), p. 785;

U. S. C. A., Title 17, Section 53, 1944 Supplement p. 102.

In other words from 1910 to date the rules of the Copyright Office have declared "dances, motion picture shows; * * * stage business; * * * sleight-of-hand performances, acrobatic or circus tricks of any kind" are not dramatic compositions.

The reference to "motion picture shows" in Rule 8 as well as Section 201.4, is manifestly traceable to the case

of *American Mutoscope & Biograph Co. v. Edison Mfg. Co.*, C.C.N.J. (1905), 137 Fed. 262, just as the other portions of the Rule are traceable to other decided cases. (See Our. Op. Br. pp. 54-57.)

2. The "bicycling" cases do not support appellee. Besides involving unauthorized performances of motion pictures without compensation to the producers, all except *Patterson v. Century Productions*, D.C.S.D.N.Y. (1937), 19 Fed. Supp. 30, assumed, or expressly held, the several motion pictures involved were dramatic productions because they told a story. In *Patterson v. Century Productions*, *supra*, the defendant misappropriated a large portion of plaintiff's travel film, made photographic impressions thereof, and exhibited its own film with such impressions as a part thereof. It is unnecessary to determine whether that case was correctly decided. It probably was not.

The only case which reached a Circuit Court of Appeals and passed on the point involved in the bicycling cases is not cited by appellee. In that case, *Metro-Goldwyn-Mayer v. Bijou Theatre Co.*, 1 Cir. (1932) 59 Fed. 2d 70, it was held that a motion picture was not entitled to the protection of dramatic copyright unless it was based on a copyrighted novel, stage drama, or book. There is, of course, no showing whatever in the record before this Court that "Movie Crazy" was based on a copyrighted novel, drama, or book. The contrary was conceded in the court below. [Tr. pp. 495-506.]

The opinion of the District Court in the case last cited (50 Fed. 2d 908) distinguishes *Kalem v. Harper Bros.* (1911) 222 U. S. 55 (also relied on by appellee) as follows:

Referring to the *Kalem* case, the Court said:

“The point decided was as to the scope of the copyright on the novel ‘Ben Hur.’

“The present question is different. Here the film itself is the subject of the copyright. Nobody questions that the plaintiff has the exclusive right to control copying it. If the film were an ordinary photograph or transparency, nobody would contend that the mere exhibition of it violated the copyright. The understanding of Congress that it does not do so in the case of a moving picture film is established with very unusual clearness. The point was explicitly raised and discussed in connection with the amendments of 1912.” (50 Fed. 2d at p. 909).

See, also, our Opening Brief, Appendix, pages 7-14.

3. The inapplicability of the comic strip cases is shown by the following from *Fleischer Studios, Inc. v. Freundlich, Inc.*, 2 Cir. (1934), 73 Fed. 2d 276 (cited in Appellee’s Brief at p. 38):

“What was copyrighted here did not come within the statutory classification. The cartoon characters displayed in bound leaf form constitute neither a printed literary, musical, nor dramatic work. To say that appellees’ article is a book and as such is a literary work would be incorrect. The copyright act of April 29, 1802 (chapter 36, 2 Stat. 171), specifically mentioned a book. Section 18 of the present law does not. USCA, title 17, § 18. A book is one of the classifications of the present law and is copy-rightable as such. USCA title 17, § 5 (a). This book of cartoons depicting a series of unconnected poses is without story or continuity, and may not be said to be a printed literary work as referred to in section 18.” (p. 278.)

The inapplicability of the comic strip cases is also shown by decisions of the Supreme Court.

In *Bleistein v. Donaldson Lithographing Company* (1903), 188 U. S. 239, it was held that while defendant was not entitled to make a photographic copy of a Courier circus poster, which, in turn, was a photograph of an actual group, defendant, nevertheless, was entitled to pose his own group and make a like photograph, Holmes, J., saying:

“Others are free to copy the original. They are not free to copy the copy.” (p. 249.)

In *Perris v. Hexamer* (1870) 9 Otto 674, plaintiff had a copyrighted map of New York, with a system of coloring, signs, and keys which was useful to persons employed in the insurance business. Defendant made a map of the City of Philadelphia, with the same system of coloring, signs, and keys, and for the same purpose. It was held there was no infringement. Waite, C. J., said:

“The question we are to consider is, whether the publication of the defendant infringes the copyright of the complainants, and we think it does not. A copyright gives the author or the publisher the exclusive right of multiplying copies of what he has written or printed. It follows that to infringe this right a substantial copy must be produced. It needs no argument to show that the defendant’s maps are not copies, either in whole or in part, of those of the complainants. They are arranged substantially on the same plan, but those of the defendant represent Philadelphia, while those of the complainants represent New York.”

See, also, our Opening Brief, pages 64-66.

(b) MAGICIAN COAT COMEDY ROUTINE.

None of the cases cited by appellee support its contention that the dinner dance scenes in "Movie Crazy" or the six or eight gags or pieces of stage business borrowed in "So's Your Uncle" are the subject matter of dramatic copyright. (Appellee's Brief pp. 31-33.)

Corelli v. Gray, 30 L. T. Rep. 116, referred to a book, and not to a dramatic composition.

In *Dymow v. Bolton*, 2 Cir. (1926), 11 Fed. 2d 690, "the fact findings were that a defendant playwright had 'deliberately appropriated [plaintiff's] story and dramatized it.' " (p. 692.)

Edwards & Deutsch v. Boorman, 7 Cir. (1926), 15 Fed. 2d 35, relates to an interest and discount time teller.

In *Sheldon v. Metro-Goldwyn-Mayer*, 2 Cir. (1936), 81 Fed. 2d 49, the motion picture, admittedly a dramatic composition, was copied almost *in toto* from a stage play, also admittedly a dramatic composition.

In *Italian Book Co. v. Rossi*, D.C.S.D. N. Y. (1928), 27 Fed. 2d 1014, defendants copied plaintiff's variation of an old Sicilian Folk Song.

In *National Institute v. Nutt*, D.C. Conn. (1928) 28 Fed. 2d 132, the action was for the infringement of a copyrighted series of memory lectures.

Manifestly, these cases do not overcome the authorities holding that without a story there is no dramatic composition.

It is scarcely necessary to reiterate that *Harold Lloyd Corporation v. Witwer, supra*, holds that the only originality protected by copyright is originality in theme.

As the Court said in that case:

“There are other definite and well-determined limitations upon the copyrightability of a plot, or sequence of events, or theme, as it is variously called.”
(65 Fed. 2d at p. 24.)

Also,

“To constitute a dramatic composition, a work must tell a connected story or series of events.”
(65 Fed. 2d at p. 25.)

Again, quoting from an earlier case:

“It is plain that the author of such a work [a play], where various incidents, in themselves common literary property, are grouped to form a *particular story*, must be confined, in his claim to copyright, *closely to the story he has thus composed*, and that another author, who, by materially varying the incidents, *materially changes the story*, should not be held to be an infringer.” (65 Fed. 2d, at p. 24.)
(Italics ours.)

(c) PUBLIC DOMAIN.

In support of its contention that public domain is not a defense appellee cites *Fisher v. Dillingham*, D. C. N. Y. (1924) 298 Fed. 145, a music case in which it was said that one is free to use all works in the public domain as sources for his compositions, but he must not copy

from another even though the latter's composition comes from the public domain. That case, however, is contrary to the *Witwer* case, and is also contrary to *MacDonald v. DuMaurier*, 2 Cir. (1944), 144 Fed. 2d 696, 701.

(d) APPELLEE'S BRIEF AS A WHOLE.

The affirmative portions of Appellee's Brief as a whole, as well as those portions to which we have particularly referred, are vitiated by the failure to recognize that cases construing other subdivisions of Section 1 of the Copyright Act cannot overthrow cases construing subdivision (d) upon which appellee's action is based; and the failure to recognize that appellee must lose unless the portion of its work borrowed, in addition to being dramatic composition and meeting other criteria, meets the constitutional requirement of promoting the "progress of science and the useful arts," that is to say, contains creative originality and not merely trivial originality.

Corcoran v. Montgomery Ward & Co., *supra*, (our Op. Br., pp. 59-60) holds that appellee's claim "is governed entirely by the statute," *i. e.*, Sec. 1, sub. (d) of the Copyright Act.

In *Harold Lloyd Corporation v. Witwer*, *supra*, (our Op. Br., p. 59), the Court said:

"The plot is common property; no one by presenting it with modern incidents can appropriate it by copyrighting." (Italics are the Court's.) (65 Fed. 2d, at p. 24.)

In *Chamberlin v. Uris Sales Corporation, supra*, the Court said:

“Obviously the Constitution does not authorize such a monopoly grant to one whose product lacks all creative originality. And we must, if possible, so construe the statute as to avoid holding it unconstitutional. Plaintiff therefore must lose unless he has shown that his work contains some substantial, not merely trivial, originality and that the defendant sold copies embodying the original aspects of his work.” (150 Fed. 2d at p. 513.)

In *Barnes v. Miner, supra*, the Court said:

“Section 8, art. I, of the Constitution of the United States, provides:

“‘The Congress shall have power * * * (8) to promote the progress of science and useful arts, by securing for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries.’

“This provision of the Constitution not only limits the power of Congress in enacting copyright laws to matters which ‘promote the progress of science and useful arts,’ but serves to aid us in defining the words ‘dramatic composition’ found in the statute, for it is not to be supposed that Congress intended to include any compositions that would not tend to ‘promote the progress of science and useful arts.’ How anything contained in the production of the plaintiff tends in this direction it is difficult to ascertain.” (122 Fed. pp. 489-490.)

The current decisions of the United States Supreme Court closely confining patent monopolies to the precise terms of the grant are pertinent here because, as shown in *Bobbs-Merrill Co. v. Straus*, (1908), 210 U. S. 339, 345-346, the Copyright Act gives a narrower monopoly than do the patent laws.

In *Mercoïd v. Mid-Continent Investment Company*, (1914), 320 U. S. 661-665, Douglas, J., reviewing the cases, says:

“The grant of a patent is the grant of a special privilege ‘to promote the Progress of Science and useful Arts.’ Const. Art. 1, § 8. It carries, of course, a right to be free from competition in the practice of the invention. But the limits of the patent are narrowly and strictly confined to the precise terms of the grant. (Citing cases.) It is the public interest which is dominant in the patent system. (Citing cases.) It is the protection of the public in a system of free enterprise which alike nullifies a patent where any part of it is invalid (citing cases) and denies to the patentee after issuance the power to use it in such a way as to acquire a monopoly which is not plainly within the terms of the grant. The necessities or convenience of the patentee do not justify any use of the monopoly of the patent to create another monopoly.”

VI.

Damage Not Shown.

In the fifty-one pages of Appellee's Brief (pp. 58-108) devoted to questions of damages, not a solitary word is said about the implied finding that all the expert testimony is untrue, or the express finding fixing special damages in a lump sum for reissue and remake rights, without allocation, although confessedly appellee's copyright monopoly does not extend to remake rights. (Our Op. Br. pp. 63-66.) Appellee is also ominously silent about the remaining controlling facts as to damages, reviewed *ante*, I, B.

These omissions, we submit, are fatal to appellee.

In *Phipps v. Commissioner of Internal Revenue*, 10 Cir. (1942), 127 Fed. 2d 214, 217, it is said:

"It does not appear what, if any, weight the Board ascribed to the expert testimony in reaching its ultimate conclusion. It may have rejected it entirely. But this it had a right to do. 'A fact-finding body may disregard the opinion of an expert and use its own judgment in arriving at value.' *Emerald Oil Co. v. Commissioner*, 10 Cir., 72 F. 2d 681, 683; see, also, *Gamble v. Commissioner*, *supra*. It may not, however, reject the opinion evidence and make an arbitrary finding of value not supported by any substantial evidence. *Emerald Oil Co. v. Commissioner*, *supra*."

As we have said, apart from the testimony of the expert witnesses, there is no direct evidence of damage, and no relevant data from which it can be inferred. (*Ante*, I. B.)

Lloyd was at pains to explain that the remaking of an old picture means making an entirely new one, and only

using the old one as a guide. [Tr. pp. 368-369.] Clearly the distribution of a remade picture is likewise a new venture, as is also the distribution of a reissued picture that is no more than a "museum piece." (See our Op. Br. p. 30.)

In *Broadway Photoplay Co. v. World Film Corporation* (1919), 225 N. Y. 104, in an opinion by the late Mr. Justice Cardozo, damages were denied for breach of contract to supply motion pictures, on the ground that the damages were no more than a mere gamble.

That decision is confirmed by common experience.

What is said in *Competition and Monopoly in American Industry* by Clair Wilcox, being Monograph No. 21 printed in 1941 for the use of the Temporary National Economic Committee, with reference to stage plays is instructive here.

It is there said:

"Close to 5,000 plays are copyrighted every year; about 100 are produced on Broadway and, of these, three-fourths are failures, less than one-tenth are hits, and only two or three run into their second year. * * * Half of those presenting plays on Broadway in any season are new concerns. The mortality among these enterprises is extremely high; it is said that 95 per cent of them fail to survive a single year. 'The commercial theater in New York,' according to the editors of Theatre Arts, 'is not a business but a gamble in which a hit show is the only winning ticket.' " (p. 62.)

See, also, dissenting opinion of Jackson, J., in *Mercoid Corporation v. Mid-Continent Investment Co.*, *supra*, (320 U. S. at pp. 678-680.)

VII.

No Contributory Infringement.

Appellee undertakes to meet our position that Bruckman is not liable as an infringer, based on the express language of Section 25 of the Copyright Act, by contending that he is a contributory infringer.

Appellee's contention is not maintainable because the doctrine of contributory infringement has been substantially limited, if not undermined, by the Supreme Court, and under what, if any, that remains of the doctrine an employee in the position of Bruckman is not a contributory infringer.

In *Mercoid Corporation v. Mid-Continent Investment Co.*, *supra*, it is said in the opinion of the Court by Douglas, J.:

"The result of this decision, together with those which have preceded it, is to limit substantially the doctrine of contributory infringement. What residuum may be left we need not stop to consider." (320 U. S. at p. 669.)

In the concurring opinion of Black, J., it is said:

"If there is such a wrong as contributory infringement, it must have been created by the federal patent statutes. Since they make no direct mention of such a wrong, its existence could only be rested on inferences as to Congressional intent. In searching for Congressional intent we ordinarily look to such sources as statutory language and legislative history. The dissent in question [referring to the dissenting opinion of Frankfurter, J.] mentions neither of these guides; in fact, it mentions no statute at all. Instead, the chief reliance appears to be upon the law of torts,

a quotation from a decision of a lower federal court which held that no infringement was shown, and the writer's personal views on 'morals' and 'ethics.' Not one of these references, unless it be the latter, throws enough light on the patent statutes to justify its use in construing these statutes as creating, in addition to a right of recovery for infringement, a more expansive right judicially characterized as a 'formula' of 'contributory infringement.' And for judges to rest their interpretation of statutes on nothing but their own conceptions of 'morals' and 'ethics' is, to say the least, dangerous business." (320 U. S. at p. 673.)

Assuming that some residuum of the doctrine of contributory infringement is left, it is not applicable here because Bruckman did not occupy a position calling for the exercise of discretion, and there was an intervening act on the part of his employer.

This is recognized in *Leon v. Pacific Telephone & Telegraph Co.*, 9 Cir. (1937), 91 Fed. 2d 484, where the Court says:

"One point remains for consideration. Defendant Dagmar Leon contends the action should have been dismissed as to her, she being no more than an employee of her husband, the defendant Fred S. Leon, with no discretion, judgment, or responsibility as to the conduct of the business.

"The point is without merit. The evidence shows Dagmar Leon to have been much more than an employee. Particularly is this shown by a letter to an agent of the Pacific Telephone & Telegraph Company, signed by Dagmar Leon, discussing prospects of the Pacific Telephone & Telegraph Company tak-

ing over the business belonging to Dagmar and Fred Leon. The letter discusses terms and conditions of the project in such fashion as to show that the writer was a responsible figure in the management of the Numerical Directory concern." (p. 487.)

In Amdur, *Copyright Law and Practice* (1936), at page 947, it is stated:

"No reported decision has been found defining the liability of mere workmen. The rule (which is thought to be analogous) in patent infringement is that workmen, although instrumental in committing the physical acts of infringement, are not liable therefor."

In *Graham v. Earl*, 9 Cir. (1897), 92 Fed. 155, a patent case, it was said at pages 160-161:

"It is well settled that a mere workman or servant who makes, uses, or vends for another, and under his immediate supervision, a patented article, is not liable in an action at law for damages which may have been sustained by the patentee by reason thereof. This rule is an apparent exception to the general principle of law which makes all who participate in a tort of misfeasance principals, and liable for damages therefor. . . ."

It is submitted that the act of Bruckman was analogous to that of a workman who built a part of a machine for his employer, calling the employer's attention to the fact that such a device had been previously used by certain specified parties, and stating or implying the workman's belief that the device was in the public domain. (See our Op. Br. pp. 27-28.)

The types of cases in which employees may be held liable for copyright infringement are illustrated by *Associated Music Publishers v. Debs Memorial Radio Fund*, 2 Cir. (1944), 141 Fed. 2d 852, where the defendant was manager of a radio station and himself selected the record whose playing infringed the plaintiff's musical copyright, and by *Buck v. Crescent Gardens Operating Co.*, D. C. D. Mass., 28 Fed. Supp. 576, where the defendant was the lessee of premises, and acted as the sublessee's agent in managing a dance hall, in addition to himself engaging, for his principal, the musicians who infringed plaintiff's musical copyright.

The authorities cited by appellee do not support its position.

In *Cain v. Universal Pictures*, D. C. S. D. Calif. (1942), 47 Fed. Supp. 1013, the court found that no infringement of any kind had occurred. The court's remarks as to who would have been liable if there had theretofore been an infringement constitute mere dicta.

Further, the case is distinguishable from the present case in that here Bruckman expressly pointed out to the producer where the material had been previously used; hence an intervening discretionary decision by Bruckman's superior whether or not to use the material previously used in "Movie Crazy" and "Loco Boy Makes Good" necessarily had to occur before any actual infringement could take place.

In *Harris v. Miller*, D. C. S. D. N. Y. (1941), 50 U. S. P. Q. 625, the authors of the infringing play were not subsidiary employees of the producer, as was Bruckman, but were principals who licensed the producers for

a royalty. The producers themselves had no knowledge that the material in the play had been previously used.

Gross v. Van Dyke Gravure Co., 2 Cir. (1916), 230 Fed. 412, involved an appeal by the printer of 16,000 copies of the infringing photograph, who had sold them to the retailer, the appeal being based upon the (incorrect) theory that appellant's failure to make a profit on the transaction of itself absolved him from liability for damages. No employees of any type were in any way involved.

Appellant's quotation from this case to the effect that all who participate in an infringement are liable for damages begs the question at issue in the present case, namely, did Bruckman's acts amount to a participation in infringement in the legal sense?

In *American Telephone v. Radio Audio*, D. C. Del. (1922), 281 Fed. 200, a patent case, the licensor of an exclusive license made a contract with a third party, which, though in form was an agreement not to sue him for infringement, the court found in substance was a license. Thereafter said third party proceeded to manufacture articles embodying the patented device. In an infringement action brought by the original exclusive licensee, the third party was held to be a direct infringer, and the licensor a contributory infringer.

Appellee's quotation from the case stating that direct and contributory infringers are liable *in solido*, again is entirely irrelevant to the basic issue in the present case, *i. e.*, whether or not Bruckman is a contributory infringer. The participation of the licensor in that case was obviously utterly different in kind from the conduct of Bruckman.

In *Towle v. Ross* (D. C. Ore., 1940), 32 Fed. Supp. 125, the defendants committed the entire infringement themselves, were direct infringers.

Appellee's quotation from Howell on *Copyright Law* to the effect that joint tortfeasors are jointly and severally liable for damages restates a long-settled principle of law, but once again one which is devoid of materiality in reaching a conclusion on the present issue, viz., whether or not Bruckman is a tortfeasor.

The acts of Bruckman do not, we submit, constitute a tort.

The doctrine of contributory infringement has never been applied to a subsidiary employee where the employer is the direct infringer, and where some intervening discretionary act by the employer, with full knowledge of the facts, must necessarily occur subsequent to the employee's act before any direct infringement can take place.

If Bruckman, a "gag writer," had taken a joke book to the producer and shown him a certain sequence of jokes, which Bruckman believed to be in the public domain, for his consideration, it could hardly be argued that Bruckman thereby became a contributory infringer. He has done little, if any, more here.

Employees have been held liable in infringement cases only: (1) where they commit direct infringements themselves; or (2) where they occupy positions of discretion, often as agents, and where no intervening act of the employer need occur between the act of the employee and the occurrence of the direct infringement.

Conclusion.

At a time when the Supreme Court has been engaged in holding that the public interest, and not the pecuniary profit of the patentee, is dominant in the patent system and in strictly confining patent monopolies to the precise terms of the grant, we undertake to say that it requires some assurance on the part of appellee to ask this Court not only to enlarge copyright monopolies given by Congress to dramatic compositions so as to include mere burlesque, but also further to enlarge such monopolies by overruling three carefully considered decisions in this Circuit and disregarding numerous well considered cases in this circuit and other jurisdictions.

It is submitted that the judgment as to Bruckman should be reversed in its entirety, with instructions to enter a judgment of dismissal.

Respectfully submitted,

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Appellees.

**REPLY BRIEF OF APPELLANT AND CROSS-APPELLEE
UNIVERSAL PICTURES COMPANY, INC. TO AP-
PELLEE'S ANSWERING BRIEF.**

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I.

**The record refutes the unsavory comments directed
at defendant Universal's opening brief.**

(1) Page 2. Plaintiff's brief is replete with the statement that the alleged infringement comprises "57 consecutive scenes." In support of this statement plaintiff refers to the judgment (Tr. p. 42) and in support of the judgment plaintiff refers to the Court's finding (Tr. p. 34). Yet plaintiff refers to no evidence in the record

to support the finding. Under Point I of its reply brief (pp. 1, 2) defendant Universal pointed out that one of its specifications of error was to this finding, as "There is no evidence in the transcript to support this erroneous finding." Plaintiff apparently has reference to the numbers appearing in the left hand margin of the script of each picture (Pltf's Exs. 3, 5). Reference to said exhibits evidences that these numbers indicate the camera shots and not scenes. Thus in the script of defendant's picture (Pltf's Ex. 3, Part 4) the numbers 67 to 112 inclusive indicate 45 different camera shots in a part of one scene, of an orchestra playing a single composition on a jute box record. Plaintiff's brief is likewise replete with the statement that the alleged infringing material comprises "20%" of the picture. There is no evidence in the record to support this statement. On the contrary it was stipulated that the running time of defendant's picture is 63 minutes, 21 seconds, while the running time of the entire magician's coat comedy routine (in which the alleged infringing "gags" and "stage business" appear) is only 6 minutes, 1 second (Tr. pp. 384, 385). Likewise plaintiff's counsel conceded (Tr. p. 71):

"Mr. Fendler: So far as the actual footage is concerned, the amount of footage is comparatively small. As nearly as I can compute it in terms of percentage it is not more than about 12 and one-half percent of the total amount of feet, running feet, in the picture."

(2) Page 3. Plaintiff states: "There was no evidence that anyone in the Lloyd organization had ever heard of any infringements by any Universal picture prior to March, 1945, and shortly before Lloyd's counsel notified Universal to cease and desist from distribution of all infringing pictures" (March 20, 1945). Lloyd's testimony was to the contrary (Tr. pp. 152, 153).

"Q. How long after the release and exhibition of 'So's Your Uncle' actually started was it that your attention was called to this sequence?

A. Well, I don't know the exact time Mr. Murphy brought it to my attention. It was in one of the trade papers where they had said that they had—

Q. Do you know when it was?

A. No, I don't know the exact time.

* * *

Q. Do you think it would be a fair statement to say that the date of your first protest to Universal represents approximately the date when you first learned of the exhibition of this picture?

A. No. No, I learned of it prior to—I had to decide what I wanted to do with it—

* * *

Q. Just a moment. Can you tell me then, Mr. Lloyd, about how long before notice was given to Universal that you first learned of the exhibition of the picture entitled 'So's Your Uncle'?

* * *

The Court: The only thing is that the witness says he doesn't know. You are asking him questions and trying to tie him down to something that he keeps telling you he doesn't know. He says Mr. Murphy attended to those things and could give you the information, but he does not have the dates."

Mr. Murphy was not called. Defendant's picture was generally released throughout the United States on December 3, 1943 (Tr. p. 384). Plaintiff had the burden of proving its ignorance of the alleged infringement for any period subsequent to December 3, 1943, and when and how its knowledge was first obtained (Deft. Universal's opening brief, pp. 72, 73).

(3) Page 3. Plaintiff states that the admission in defendant Universal's answer "that said defendant has continued with the distribution and exhibition of said motion picture photoplay" after notice of the alleged infringement, supports the Court's finding to such effect. To

obviate said defendant introducing testimony to correct this inadvertent error in its answer, plaintiff's counsel stipulated that shortly after the receipt of the first notice of plaintiff's alleged claim (March 20, 1945) said defendant did send out instructions to all its exchanges to stop the exhibition of the picture, which instructions were thereupon complied with (Tr. p. 452).

(4) Page 11. Plaintiff further states regarding the stipulation (referred to in (3) above): "It is furthermore untrue that plaintiff 'stipulated that exhibition of defendant's picture had been stopped upon the receipt of plaintiff's notice of infringement' * * *. The record shows a stipulation that Universal sent instructions to its exchanges to stop the exhibition but the exact date of such instructions was never given and plaintiff's counsel expressly stated: 'I will not stipulate the instructions were complied with' (Tr. p. 452)." Plaintiff stipulated that such instructions were given "shortly after receipt of the notice of this communication of March 20." Furthermore, while plaintiff says "plaintiff's counsel expressly stated 'I will not stipulate the instructions were complied with,'" the part of the record immediately following the above quotation (which plaintiff has naively omitted) evidences the direct contrary:

"Mr. Fendler: I will stipulate such instructions were given. I will not stipulate the instructions were complied with.

Mr. Abeles: To the best of our knowledge they were complied with.

Mr. Fendler: You do not contend the plaintiff is not entitled to an injunction do you?

Mr. Abeles: No.

Mr. Fendler: Very well, *we will so stipulate.*"

(5) Page 12. Plaintiff states: "Furthermore, on September 13, 1946, six months after the written notice, Universal's counsel had stated in open court that the picture 'will be' withdrawn (Tr. p. 345); he later ex-

pressly stated he did not contend that plaintiff was not entitled to injunction (Tr. p. 452).” At the end of the first session of the trial, plaintiff’s counsel had asked for a temporary injunction. The Court said that plaintiff could apply for an injunction if there was ever any showing that the exhibition of the picture was resumed, to which defendant’s counsel replied that it would be withdrawn *if* there was any such future showing. In view of this, the Court held “there is no occasion for granting an injunction which will have to be on bond to protect the plaintiff (Tr. pp. 345, 346). In fact, at the later session of the trial, plaintiff’s counsel stipulated that upon receipt of notice of plaintiff’s alleged claim, said defendant had given instructions to all its exchanges to stop the exhibition of the picture, which had been complied with (Tr. p. 452). Defendant’s counsel merely agreed that plaintiff should be entitled to an injunction if it succeeded in the action, as a condition of plaintiff’s stipulation that the exhibition of the picture was stopped upon receipt of said notice (Tr. p. 452):

“Mr. Fendler: You do not contend that plaintiff is not entitled to an injunction, do you?

A. No.

Mr. Fendler: Very well, we will so stipulate.”

(6) Pages 4-8. Plaintiff takes issue with the statement of said defendant, that it was not aware it was infringing and such alleged infringement could not have been reasonably foreseen. However, the unrefuted evidence supports this position (Tr. pp. 235-238, 310-313, 316, 317, 321-326, 330-332, 335-340).

(7) Page 7. Referring to Sec. 25 of the Copyright Act (Act. of March 4, 1909, Ch. 320, 35 Stat. 1081) plaintiff says: “In no event does the \$5,000.00 limitation apply to actual damages. The limitation is solely upon statutory damages * * *.” On the contrary, Sec. 25 specifically provides:

“That if any person shall infringe the copyright in any work protected under the copyright laws of the United States such person shall be liable: * * * (b) To pay to the copyright proprietor *such damages* as the copyright proprietor may have suffered due to the infringement, as well as all the profits which the infringer shall have made from such infringement * * *, or in lieu of actual damages and profits *such damages* as to the Court shall appear to be just * * *; and in the case of an infringement of a copyrighted dramatic or dramatico-musical work by a maker of motion pictures and his agencies for distribution thereof to exhibitors, where such infringer shows that he was not aware that he was infringing a copyrighted work, and that such infringements could not reasonably have been foreseen, *the entire sum of such damages* recoverable by the copyright proprietor from such infringing maker and his agencies for the distribution to exhibitors of such infringing motion picture shall not exceed the sum of five thousand dollars nor be less than two hundred and fifty dollars, and such damages shall in no other case exceed the sum of five thousand dollars nor be less than the sum of two hundred and fifty dollars, and shall not be regarded as a penalty. But the foregoing exceptions shall not deprive the copyright proprietor of any other remedy given him under this law, *nor shall the limitation as to the amount of recovery* apply to infringements occurring after the actual notice to a defendant, either by service of process in a suit or other written notice served upon him.”

In *L. A. Westermann Co. v. Dispatch Printing Co.*, 233 Fed. 609, 613 (Cir. Ct., 6th Cir.), the Circuit Court expressed doubt as to whether the maximum and minimum applied to actual damages recoverable under the first part of the section:

“The statute says that ‘such damages shall’ be governed by a maximum and minimum. Whether

this phrase, 'such damages,' and the maximum and minimum limitations, apply to the actual damages which may be proved and established under the first part of this section, or only to the 'just' damages given 'in lieu of actual damages,' cannot be determined from mere arrangement of the language, but must depend upon more indirect interpretation. This question likewise does not directly require decision in this case. The limitations unquestionably apply to the 'in lieu' damages, which are the only ones here involved; their application to actual damages may be passed over."

Upon appeal (249 U. S. 100, 39 Sup. Ct. 194, 63 L. Ed. 499) the Supreme Court was only concerned with the minimum recovery, which it held applied in all cases.

Thus in *M. Witmark & Sons v. Calloway*, 22 Fed. (2d) 412, 414, the Court said, in citing and following *L. A. Westermann Co. v. Dispatch Printing Co.*, *supra*:

"The damages indicated in the proof are small, but cannot be fixed at less than \$250, and they are therefore fixed at that sum. Section 25 of chapter 320, 35 Stat. 1081, known as the Copyright Act; *Sauer v. Detroit Times Co.* (D. C.) 247 F. 687, opinion by Judge Tuttle, one of the judges of the Sixth Circuit; *Westermann Co. v. Dispatch Printing Co.*, 249 U. S. 100, 39 S. Ct. 194, 63 L. Ed. 499, affirming upon the point *Westermann Co. v. Dispatch Printing Co.* (C. C. A.) 233 F. 609, in certiorari from the Sixth Circuit; also memorandum opinion of this court in *Henry L. Cravens et al. v. Retail Credit Men's Ass'n*, 23 F. (2d)—October 20, 1924. See, also, *Jerome H. Remick Co. v. Gen. Elec. Co.* (D. C.) 16 F. (2d) 829, and *Waterson, Berlin & Snyder Co. v. Tollefson* (D. C.) 253 F. 859."

Accordingly, if the minimum applies to actual damages recoverable under the first part of the section, the maximum must likewise apply. In the instant case plaintiff

has failed to establish actual damage, and as defendant's profits were stipulated, plaintiff's recovery in any event should be limited to that part of such stipulated profits due to the infringement.

(7) Page 8. Plaintiff makes capital of an obvious typographical error in said defendant's opening brief (p. 31), reading: "Plaintiff's witness Hirliman" instead of "Defendant's witness Hirliman." Said defendant called this error to the attention of the Clerk of this Court, who advised that the error had been corrected on all filed copies of the brief.

(8) Page 8. Plaintiff states: "Similarly misleading is the statement that the Trial Court 'recognized that as this sequence was not a part of the general theme, it could be deleted without affecting the picture.'" The record evidences (Tr. p. 141):

"The Court: And I have been asking questions. I want to say frankly, because I feel that this is a part of the whole that could be lifted out and I am trying to get that approach."

(9) Page 9. Plaintiff states that "defendant Universal apparently objects to the Trial Court's consistency in excluding defendant's offered evidence as to the price paid for a 'silent' motion picture 'Girl Shy' (Tr. p. 447) after the Court had sustained defendant's objections to similar proof offered by plaintiff with respect to comparable 'talking' motion pictures like 'Movie Crazy.'" The picture was not "Girl Shy" but "Safety Last" (Tr. pp. 428-430). It did not suit Lloyd's purpose to admit that the rights to one of his best pictures had been sold for only \$3,500. Neither did it suit his purpose to admit that not one exhibitor would take the picture, because there was no demand for the re-issue or re-make rights of any pictures of this nature, as distinguished from a picture based upon a famous stage play or novel (Tr. p. 460). So Lloyd denied that such rights had ever been sold to

any of his pictures (Tr. p. 354) and testified that the rights to the picture "Safety Last" would "probably be very valuable" (Tr. p. 352). This proof was offered by defendant for the sole purpose of contradicting Lloyd's testimony upon this material point in issue (Tr. pp. 428-430). Plaintiff, however, offered evidence of the price paid for the re-make rights to pictures based upon famous stage plays and novels, although plaintiff's witnesses confirmed the testimony of defendant's expert Hirliman, that no picture of the type of "Movie Crazy" (where the story and comedy material was specially written for the personality of a particular comedian) had ever been re-made (Tr. pp. 363, 364, 469, 470, 434, 437-440, 448). Likewise, as Lloyd conceded that the only picture of the latter type which in his opinion might be successfully re-made, was Chaplin's picture "The Gold Rush" (Tr. p. 364), such proof offered by plaintiff could serve no possible purpose.

(10) Pages 12, 13. Plaintiff states: "The damage done by Columbia's infringements was not pleaded in mitigation and the amount of such damages was not in issue in this lawsuit." Such matter need not be affirmatively pleaded.

Chicago, M. & St. P. Ry. Co. v. Holverson, 264 Fed. 597, 600 (Cir. Ct., 8th Cir.):

"The court excluded the testimony for the stated reason that this element of defense was not set up in the answer. The exclusion cannot be sustained. The burden was upon the plaintiff to make his case. The general issue was tendered. Under it, any matter of this nature, affecting the right of plaintiff to recover, or conditioning the amount of his recovery, could properly be shown."

To the same effect:

United States v. Homestake Min. Co. 117 Fed. 481, 490.

Furthermore, the issue of the prior use by Columbia of the same material was first raised at the trial by plaintiff's counsel (Tr. p. 61):

"Mr. Fendler: * * * It appears that Clyde Bruckman, after he left Harold Lloyd's employ, went to work for Columbia Pictures Corporation as a writer and, in 1941, in a two-reel comedy, used the same identical sequence which appears in the Lloyd picture and which appears in the Universal picture."

The preliminary evidence was then developed at the first session of the trial, without objection (Tr. pp. 151, 153, 154, 159). The deposition of the representative of Columbia was subsequently taken, and received in evidence *by stipulation* at the second session of the trial (Tr. p. 388):

"Mr. Abeles: I just wanted to ask him one thing. Your Honor, at the this time I would like to offer in evidence, and I understand it is on file, isn't it? The deposition of the Columbia Pictures Corporation. I have a copy here. It is the deposition of George Josephs of Columbia Pictures Company, taken on October 31, 1945, at 2:00 p. m., before Shirley Wiley, Notary Public in New York City.

The Court: Are you going to introduce the deposition in evidence?

Mr. Abeles: I offer it in evidence with the direct and cross interrogatories.

Mr. Fendler: That is satisfactory. We will *stipulate* it may be deemed to have been received."

Plaintiff concedes that "the *amount* of such damage (by the Columbia picture) was not an issue in this lawsuit." That is the basis of defendant's argument. The evidence established and the Court said in its opinion that the Columbia short affected the amount of plaintiff's recovery against this defendant (Tr. p. 521). There was no evidence of the *amount* of damage resulting from this prior separate cause. The Trial Court said: "I find and fix the

actual damages suffered by Mr. Lloyd in the sum of \$40,000" (Tr. p. 522). The proof was too uncertain to permit the Court arbitrarily to apportion a part of such alleged damages (by both Columbia and defendant) to the subsequent acts of defendant. How then could the Court award all of such alleged damages against defendant?

Plaintiff had the burden of showing what part of its alleged loss was due to the acts of Columbia, and what part to the acts of defendant.

Corpus Juris Secundum, Vol. 25, Damages, Sec. 28, page 496:

"Where there is evidence as to damage from various causes, as to a portion of which defendant cannot be held responsible, and no evidence as to the portion of the damage resulting from the separate causes, the proof is too uncertain to permit the jury arbitrarily to apportion a part of all of the proved damages to the acts for which defendant is responsible." Citing *Wade v. Thorsen*, 43 Pac. 2d 592, 5 Cal. App. 2d 706; *Austin v. Roberts*, 20 Pac. 2d 97, 99, 130 Cal. App. 328.

No recovery can be had where resort must be had to speculation or conjecture for the purpose of determining whether the damages resulted from the act of which complaint is made or from some other cause.

Thus in *Union Oil Co. of California v. Hunt*, 111 Fed. (2d) 269, 277, 278 (Cir. Ct., 9th Cir.), cited on page 63 of plaintiff's brief, this Court quoted and followed the settled rule of law enunciated in *American Jurisprudence*:

"It is said in the article on 'Damages,' in *American Jurisprudence*:

'The damages recoverable in any case must be susceptible of ascertainment with a reasonable degree of certainty, or, as the rule is sometimes stated, must be certain both in their nature and in respect of the cause from which they proceed.' 15 Am. Jur. § 20, p. 410.

'The damages recovered in any case must be shown with reasonable certainty both as to their nature and in respect of the cause from which they proceed. No recovery can be had where it is uncertain whether the plaintiff suffered any damages unless it is established with reasonable certainty that the damages sought resulted from the act complained of. Hence, no recovery can be had where resort must be had to speculation or conjecture for the purpose of determining whether the damages resulted from the act of which complaint is made or from some other cause, * * *.' 15 Am. Jur. § 22, p. 413."

Plaintiff likewise states: "The files of the United States District Court for the Southern District of California, Central Division, in action No. 5184-W, reflect the fact that the Harold Lloyd Corporation filed suit several months ago against Columbia Pictures Corporation and Clyde Bruckman for infringements by the Columbia 'short.' " Plaintiff alleged in the complaint in this action, that by reason of defendant's use of the alleged infringing material "plaintiff's rights have been totally destroyed" (Tr. p. 5). Plaintiff's action against Columbia is to recover the same damages, for the prior use of the same alleged infringing material. The Columbia picture had been exhibited in more theatres than defendant's picture (Tr. pp. 90, 391), "in all states in the United States—in all types of cities, both large and small, throughout the United States—in all types, kinds and characters of motion picture theatres in the United States, varying from large to small theatres in metropolitan areas as well as theatres in large and small towns" (Tr. p. 391). How then could the Trial Court determine that defendant's picture had caused any additional damage to plaintiff's picture—much less the total amount of plaintiff's alleged damage?

(11) Page 2. App. I. Plaintiff states that defendants did not object to Lloyd's testimony as to the alleged damage sustained by plaintiff. On the contrary, such

testimony was received over defendant's repeated objections and motion to strike (Tr. pp. 100, 102, 104, 105, 138, 140, 490, 492, 493, 27, 524).

(12) Page 3, App. I. Plaintiff states that defendant's witness Hirliman confirmed Lloyd's testimony that re-issuing a picture is a well-known practice in the industry. On the contrary Lloyd testified (Tr. p. 369):

"The Court: And is that more or less of a common practice in the industry?

A. Well it could be.

The Court: Well, do you know whether it is?

The Witness: I think it is to a degree."

The witness subsequently conceded that he was not qualified and in no position to express any opinion as to the availability or value of such rights:

"The Court: And do they interchange them between studios?

The Witness: I think so.

The Court: Don't you know?

The Witness: I am not positive because I have kept myself more or less in the production end of the business * * *'' (Tr. p. 369).

The Court recognized that this testimony had completely disqualified the witness:

"I was asking general questions as to the practice in the industry which will probably come out through other witnesses that have handled that end of the business and will be qualified to testify" (Tr. p. 371).

Hirliman testified that while a picture, comedy or otherwise, based upon a famous stage play or novel might have a re-issue or re-make value, a picture of the nature of plaintiff's, that is a situation comedy where the story and comedy material was written specially for the personality of a particular comedian, would have no value for such purpose (Tr. pp. 434, 437-440, 448); and that in

the entire history of the industry no such picture of the latter type had ever been re-made (Tr. p. 448); which was confirmed by plaintiff's witnesses (Lloyd, Tr. pp. 363, 364; Botsford, Tr. pp. 469, 470).

(13) Pages 19-25, App. II. Throughout its brief plaintiff refers to the Court's finding (Tr. p. 34) that "the characters, characterization, motivation, treatment, action and sequence of action," in the magician's coat sequence in defendant's picture were copied from plaintiff's picture. Likewise in App. II, under the heading "The Deadly Parallel," plaintiff distorts the pertinent parts of the scripts of both pictures, and concocts innumerable fictitious parallels, in a strained effort to justify the Court's erroneous finding. The same "gags" and "stage business" had been used by plaintiff in another picture (Tr. p. 73) and in the Columbia picture (Tr. p. 61). The Court said that "it was no part of the general theme," was merely "cut into the picture" for comedy accretion (Tr. pp. 142, 143), and accordingly was "a part of the whole that could be lifted out" as readily as it was "cut in" (Tr. pp. 139, 141). Such "gags" and "stage business" had been inserted in defendant's picture, after the particular sequence was created as they had been in plaintiff's picture, for comedy accretion to the story (Tr. pp. 228, 235, 236). Plaintiff's counsel conceded upon the trial, that the extent of plaintiff's claim was that this material "was interpolated into the Universal picture" (Tr. p. 69).

II.

Plaintiff's argument and the pertinent cited authorities are not in accord.

Pages 49-51. Plaintiff attempts to discard a number of English cases cited by defendant as "no longer the law," with a quotation from *Falcon v. Famous Players Film Corp.*, 2 K. B. 474, to the effect that the 1911 Act "was intended to enlarge protection to authors, and to sweep away those decisions by which rights had been limited,

as against *the makers of mechanical instruments* by which their works could be reproduced." This decision did not question the established rule of law expounded in the cases cited by defendant, that "gags" and "stage business" having no dramatic quality are incapable of copyright protection.

Page 52. The following part of plaintiff's quotation from the decision of this Court in *Harold Lloyd Corporation v. Witwer*, 65 Fed. (2d) 1, 16, is in complete accord with defendant's argument, that such "gags" and "stage business", being merely comedy accretion to the story, their use cannot constitute an infringement of plaintiff's copyright:

"None of these gags and no such sequence is in the story. Consequently there was no effort to reproduce some such humorous situation in the story, but the purpose was to create a separate distinct sequence in the case of each gag to produce laughter on the part of the audience. It is not contended that these matters were copied from the story; on the contrary, it is admitted that there is a large amount of original material in the play. There is nowhere any slavish copying of anything in the story of Rodney."

Pages 61, 62. Plaintiff indicates two quotations from *25 Corpus Juris*, Sec. 28, pp. 493, 494, but apparently has reference to *25 Corpus Juris Secundum*. The parts quoted, however, are qualified by the quotation following (p. 496):

"However, where actual pecuniary damages are sought, there must be evidence of their existence and extent, and some data from which they may be computed. No substantial recovery may be based on mere guesswork or inference; without evidence of facts, circumstances, and data justifying an inference that the damages awarded are just and reasonable compensation for the injury suffered;"

Page 62. The decisions in *Sinclair Refining Co. v. Jenkins*, 289 U. S. 689 (53 Sup. Ct. 736, 77 L. Ed. 1449) and *Palmer v. Connecticut Ry. Co.*, 311 U. S. 544 (61 Sup. Ct. 379, 85 L. Ed. 336) have been misinterpreted by plaintiff. (See Universal's Reply Brief, pp. 2-6).

Page 63. The decision in *United States Frumentum Co. v. Lauhoff*, 216 Fed. 610, has been misinterpreted by plaintiff. (See Universal's Reply Brief, pp. 8-11).

Page 63. *President & Directors of the Manhattan Co. v. Kelby*, 147 Fed. (2d) 465. The quotation from *Story Parchment Co. v. Paterson*, 282 U. S. 555, 563 (51 Sup. Ct. 248, 75 L. Ed. 544) is qualified by the statement "the damages may not be determined by mere speculation or guess." Thus in the later case of *Bigelow v. R. K. O. Radio Pictures, Inc.*, 327 U. S. 251, 264 (66 Sup. Ct. 574, 90 L. Ed. 579) the Court said to the same effect: "In such a case, even where the defendant by his own wrong has prevented a more precise computation, the jury may not render a verdict based on speculation or guesswork."

Page 63. *John B. Stetson Co. v. Stephen L. Stetson*, 85 Fed. (2d) 586. Plaintiff's alleged quotation does not appear in the decision.

Page 63. In *Union Oil Co. of California v. Hunt*, 111 Fed. (2d) 269, 277, this Court said (p. 278):

"For Oregon authority that the quantum of damages cannot be based upon or left to speculation, surmise, or guesswork, see *Albright v. Keats Auto Co.*, 85 Or. 134, 166 P. 758. See also 17 C. J. § 90, p. 758."

Page 64. *Broadway Photoplay Co. v. World Film Corp.*, 225 N. Y. 104, 109 (121 N. E. 756). Plaintiff quotes as follows:

"The plaintiff was not required to prove its damages to the dollar."

However, this is qualified by the sentence following:

“It was required, however, to supply some basis of computation (authorities cited); and this it did not do.”

The Court said further (p. 108):

“But there is nothing in the evidence to supply a basis for the comparison. No law of averages, no constant or approximate uniformity of returns, can be gathered by induction from the sporadic and varying instances scattered through this record. The pictures of the first run are few in number. They disclose no semblance of equality in their returns when compared with one another. They disclose a like diversity when compared with pictures of later runs. * * * Nothing but guesswork can place the damages at \$4,500 or any other fixed amount.”

Page 65. *Muther v. United Shoe Machinery Co.*, 21 Fed. (2d) 773. The Court held (p. 776):

“The plaintiff carries the burden of proving by competent evidence his damages resulting from lost royalties or lost profits. In determining the extent of such damages, the Court may not indulge in conjecture or speculation. The damages must be shown by ‘clear and definite proof.’ ”

The Court said that as plaintiff had not proved his damages by “clear and definite proof” and as profits were not shown, it was a “typical case” for the recovery of statutory damages (the “reasonable royalty” rule, Sec. 70 Patents, 35 U. S. C.).

Page 65. *Paramount Productions, Inc. v. Smith*, 91 Fed. (2d) 863. The action was for breach of contract for failure to give screen credit to plaintiff. This Court said (pp. 866, 867):

“We do not believe the evidence is subject to the charge of uncertainty. Appellee testified that he and

another writer collaborated in writing a story and sold it without screen credit for \$10,000, which the two writers divided. Appellee's story was sold for \$2,500, but under a contract that required that he be given screen credit. From these figures, the jury might easily compute the advertising value of the screen credit. He also testified that he received screen credit for a play; that prior thereto his salary was \$250 per week; and that afterward he received \$350 per week at one time, and \$500 per week for a period of two weeks, due to the screen credit he had received. That evidence is, if believed, likewise sufficient as a gauge for the measure of the damages."

Page 67. *Sheldon v. Metro-Goldwyn Pictures Corporation*, 106 Fed. (2d) 45. The case involved an apportionment of profits, not proof of damages. The Court cites *Pieczonka v. Pullman Co.*, 102 Fed. (2d) 432, which being a death case, the Court recognized that the mortality tables furnished a proper basis of expectancy.

Page 68. *Bigelow v. R. K. O. Radio Pictures, Inc.*, 327 U. S. 251 (66 Sup. Ct. 574, 90 L. Ed. 579). Plaintiff omits the following statement preceding its quotation, which materially affects the purport of the part quoted (p. 264):

"In such a case, even where the defendant by his own wrong has prevented a more precise computation, the jury may not render a verdict based on speculation or guesswork. But the jury may make a just and reasonable estimate of the damage based on relevant data, and render its verdict accordingly."

Page 69. *Gotham Silk Hosiery Company v. Artcraft Silk Hosiery Mills*, 147 Fed. (2d) 209. The question involved was the proper apportionment of profits. The Court said (p. 214) that as the defendant had deliberately destroyed its records from which an apportionment could have been made, after the action for accounting was com-

menced, the burden of proof of apportionment shifted to the defendant.

Page 69. *American Law Institute Restatement of Contracts*, Par. 331 (cited by plaintiff as 33), Comment a. The statement of law preceding this comment (p. 515) reads:

“Damages are recoverable for losses caused or for profits and other gains prevented by the breach only to the extent that the evidence affords a sufficient basis for estimating their amount in money with reasonable certainty.”

Page 69. *Story Parchment Co. v. Paterson*, 282 U. S. 555 (51 Sup. Ct. 248, 75 L. Ed. 544). The action was to recover damages under the Sherman Anti-Trust Act, as a result of defendant's unlawful combination. As the defendants were going businesses, the Court said (p. 561):

“There was evidence from which the jury reasonably could have found that in pursuance of the conspiracy respondents sold their goods below the point of fair profit, and finally below the cost of production; that petitioner had an efficient plant and sales organization, and was producing a quality of paper superior to that produced by either of the three companies; and that current prices, shown in detail, were higher during a period antedating the unlawful combination and price cutting in pursuance of it than afterward. * * * there was evidence of the prices received by petitioner before the cut prices were put into operation, and those received after, showing actual and substantial reductions, and evidence from which the probable amount of the loss could be approximated.”

Page 69. *Dowagiac Manufacturing Company v. Minnesota Moline Plow Company*, 235 U. S. 641 (35 Sup. Ct. 221, 59 L. Ed. 398). The action was for patent infringement. The Court said (p. 648) that as there was “no adequate

basis for the assessment of damages," and there being no proof of profits, the "reasonable royalty" rule (Sec. 70 Patents, 35 U. S. C.) was applicable.

Pages 70-74. The cases cited by plaintiff under Point III (B) merely enunciate the general rule of law, that an owner can testify, to his knowledge of the value of his property, but as said in *22 Corpus Juris, Evidence*, Sec. 683, page 582:

"An owner cannot be allowed to state a special value which the property has to him, or the amount at which he valued the property, as distinguished from its real value."

Obviously this rule of law has no application. In the instant case *Lloyd's* testimony was not as to the value of plaintiff's property. He was permitted to testify over defendant's objections and motion to strike (Tr. pp. 100, 102, 104, 105, 138, 140, 490, 492, 493, 27, 524) to (a) the profits which in his opinion plaintiff or someone else might make if they should ever re-issue or re-make plaintiff's picture, and (b) the extent to which the use of the alleged infringing material in defendant's picture might affect the amount of such profits, if defendant's picture ever was re-issued or re-made by plaintiff or someone else, viz.:

"Q. Prior to the release of the motion picture entitled 'So's Your Uncle', by Universal during the month of December, 1943, what was the value of the re-issue rights of the motion picture 'Movie Crazy'?

A. I would say it should be well over \$100,000.

Q. And what was the value of the re-issue rights of 'Movie Crazy' after the production and distribution of 'So's Your Uncle'?

A. I would say it has been destroyed.

Q. What was the value of the re-make rights of 'Movie Crazy' before the production and release of the Universal picture 'So's Your Uncle' as of December 1, 1943?

A. I would say it would be \$200,000, probably a great deal more, according to the quality of the picture.

Q. By Mr. Fendler: What is the value of the re-make rights of 'Movie Crazy' as of the present time?

A. I would say that also was destroyed." (Tr. pp. 104, 105.)

He evaluated such rights solely upon the prospective profits that plaintiff might make if it ever should exercise such rights, or the prospective profits some other producer might make if plaintiff should ever sell such rights.

"Q. Your idea, as I understand it, is these re-issue rights might be sold to somebody who would have new prints made of the film and would distribute it throughout the theatres of the country?

A. They might do that or I might do it myself." (Tr. p. 149.)

* * *

"Q. By Mr. Abeles: You say you had in mind two things—either you would re-make it or somebody else would re-make it, is that correct?

A. Naturally.

Q. Now, if you re-made it did you have in mind that figure you testified to as being the profit that you would make from making the picture? * * *

The Witness: You are asking me to assume something. I think you can make a great deal of profit if I made it myself and I think someone else could make a great deal of profit if they also re-made it." (Tr. p. 360.)

* * *

"Q. When you state that figure who have you got in mind would re-make it? You or somebody else?

A. Myself or somebody else. It would be according to how well done it is. That is what I tried to make plain." (Tr. p. 361.)

"Q. By Mr. Abeles: What do you base that figure upon if you re-made it yourself? That is a simple question. Just answer that, please, Mr. Lloyd.

A. Well, I just stated that other pictures have been made, many of them?

Q. Is that an answer?

The Court: In other words, what is your opinion from your experience in the industry?

The Witness: Other pictures have been re-made and made tremendous amounts of money. What is the reason to assume that my picture cannot be just as good as the other pictures that have been re-made?

Q. How would you make \$400,000 or \$500,000 if you made the picture yourself? Do you mean the profit you would make out of it? Is that what you have in mind?

A. Naturally, that is what you would make out of it." (Tr. pp. 362, 363.)

It was error to admit this testimony. Such speculations and conjectures of plaintiff's president Lloyd are in the same category as that of plaintiff's other alleged experts, and cannot support the Court's award of damages.

In the leading case of *Central Coal & Coke Co. v. Hartman*, 111 Fed. 96, 98-102 (Cir. Ct., 8th Cir.), the Court said:

"The only damages claimed in the petition, and the only losses which the plaintiff sought to prove at the trial, were the loss of some of the expected profits of his business of buying and selling coal between January 1, 1897, and January 25, 1899. * * * Actual damages only may be secured. Those that are speculative, remote, uncertain, may not form the basis of a lawful judgment. The actual damages which will sustain a judgment must be established, not by conjectures or unwarranted estimates of witnesses, but by facts from which their existence is logically and legally inferable. The speculations, guesses, estimates of witnesses, form no better basis of recovery than the speculations of the jury themselves. Facts must be proved, data must be given which form a rational basis for a reasonably correct estimate of the nature

of the legal injury and of the amount of the damages which resulted from it, before a judgment of recovery can be lawfully rendered. These are fundamental principles of the law of damages. * * *

* * *

Did the plaintiff make any proof of this character at the trial below? The only evidence he offered relating to the damages which he claimed was his own testimony, and he directed this to four elements of injury which he evidently thought tended to show loss of profits, viz. loss of customers, diminution of supply of coal, decrease of volume of business, and the amount of his anticipated profits on sales that he did not make. * * * He produced no contracts he had ever made. He named no customer with whom he had ever had a contract, no customer whom he had lost. * * * Here are no facts—no data—from which the number of customers or the amount of custom which he had lost can be lawfully inferred, none which make the amount of the contracts for future delivery which he did not make either reasonably or unreasonably certain, no basis for even a fair conjecture. * * * But the evidence disclosed the fact that this \$12 to \$20 was the difference between the amount he paid for a car load of coal and the amount which he retailed it for, and that it would be necessary to deduct from this alleged profit the proper proportion of the expenses of hiring the teamsters, maintaining the teams and the office, handling the coal, and operating the business, before the actual profit could be ascertained; and there was no evidence of the amount of these expenses. * * *

* * *

Testimony of this character is nothing but conjecture, and it presents no substantial evidence to make certain the profits that were lost, if any. Expected profits are, in their nature, contingent upon many changing circumstances, uncertain and remote at best. They can be recovered only when they are

made reasonably certain by the proof of actual facts which present data for a rational estimate of their amount. The speculations and conjectures of witnesses who know no facts from which a reasonably accurate estimate can be made form no better basis for a judgment than the conjectures of the jury without facts."

This is the settled rule of law, the testimony of the *plaintiff* in each of the following cases being in the same category as that of Lloyd in the instant case.

Sussex Land & Live Stock Co. v. Midwest Refining Co., 276 Fed. 932, 944, *aff'd* 294 Fed. 597 (Cir. Ct., 8th Cir.):

"In addition to the testimony of the witness Davis, president of the plaintiff company, other witnesses were introduced by the plaintiff as experts to testify to what was considered a fair and average profit per head in the sheep and cattle business in the community in which the business of the plaintiff was located.

I cannot conceive of any class of testimony which would bring the proof of damage more within the realm of speculation than does this class. It is a matter of common knowledge that success in business, and thereby the derivation of profits therefrom, depends upon many varying circumstances."

Davis v. Carnegie Steel Co., 244 Fed. 931, 934 (Cir. Ct., 6th Cir.):

"The sole basis of plaintiffs' claimed right of recovery is loss of profits, by being denied the right to perform. While plaintiffs showed the value of the crushed slag, there was no evidence of the cost of crushing and marketing it, and it seems to be assumed that a considerable portion at least required such treatment to make it marketable. The proof of profits lost was speculative and conjectural. Plaintiffs' testimony, based on inquiries at Detroit, that there was a given profit per ton at that place in the

handling and marketing of slag, was properly excluded; * * * ”

McCornick v. United States Mining Co., 185 Fed. 748, 750, 751 (Cir. Ct., 8th Cir.):

“Notwithstanding plaintiff had been in undisturbed possession of the mines in question for a number of years, it had only taken out, prior to the granting of the injunction, some 500 to 1,000 tons in all, and from the time of the dissolution of the injunction to the time of the trial (some 16 months), they took out but 7,500 tons. The manager of plaintiff, on being asked while on the witness stand why more ore was not taken out of the mines in question, answered:

‘I don’t know that I could give any definite reason. There were other ores just as convenient as those, and we have taken our time to get the others—simply haven’t got to it. It was ours, and we could take it out at any time.’

* * * the testimony of the witness that, but for the injunction, plaintiff could and would have taken out 100 tons per day, was but the expression of an opinion or conjecture, so far as it relates to the expression ‘would have.’

The damages sought to be recovered are based on an alleged loss of profits. The law with respect to loss of profits being the basis of a recovery in an action for damages is that profits which would have been realized, but for the act of defendant, and which are not open to objection of uncertainty or remoteness, may be recovered, but profits depending upon numerous uncertain and changing contingencies are too indefinite and untrustworthy to constitute a just measure of actual damages. *Howard v. Stillwell & Pierce Mfg. Co.*, 139 U. S. 119, 11 Sup. Ct. 500, 35 L. Ed. 147; *Coosaw Min. Co. v. Carolina Min. Co., et al.* (C. C.) 75 Fed. 860; *Central Coal & Coke Co. v. Hartman*, 49 C. C. A. 244, 111 Fed. 96; *Cincinnati Gas Co. v. Western Siemens Co.*, 152 U. S. 200, 14 Sup. Ct.

523, 38 L. Ed. 411; Callaway Min. & Mfg. Co. v. Clark, 32 Mo. 305.”

Iron City Toolworks, Ltd. v. Welisch, 128 Fed. 693, 694-697 (Cir. Ct., 3rd Cir.):

“The main question, however, underlying them all, and with which we are here alone concerned, is whether the plaintiff was entitled to recover as damages, alleged profits which he claimed he might have realized but for the breach of contract on the part of the defendant. * * *

* * * Upon this testimony of the plaintiff himself, as to what profits he believed he might have made, had the contract been fulfilled according to its terms, the learned judge of the court below charged, as follows:

“* * * Under the evidence in this case, you will determine what the plaintiff could have sold these picks for if they had been delivered to him in accordance with the terms of his contract. * * * The law in a case of this kind seeks, as far as is humanly possible, to give compensation to one who has been aggrieved by a breach of contract, pecuniary compensation, and in accordance with that principle of law I have instructed you, and I now repeat the instruction, that the true measure of damages here, the just and legal measure of damages, is the actual loss which the plaintiff sustained by reason of the failure to deliver these picks for the purpose for which they were intended. You have the testimony of the plaintiff as to the demand and as to what he was offered for these picks, and you have in the order figures by which, it seems to me, you may arrive at the actual loss he sustained if you find in his favor.’

The learned judge stated to the jury that the true measure of damages here, was the actual loss which the plaintiff sustained by reason of the failure to deliver these picks for the purpose for which they were intended. This, as a broad statement of the

general rule, is quite correct. The difficult question is, what are the elements of this 'actual loss,' which is to be the measure of damage in a given case? or, in this case, how far are expected profits, or profits which plaintiff claims might have been realized but for the breach of contract by the defendant, such an element? No element of loss can be considered in the computation of damages, that is not clearly and unqualifiedly proved, and for this reason, the general rule, correctly stated by the learned judge in his charge, has always excluded proof of uncertain or speculative profits. * * * Such evidence has not the degree of certainty required by the law, and the hardship that may in particular cases accrue to individual plaintiffs by the exclusion of such testimony, must be weighed against the greater hardship and inconvenience that would result in the administration of justice from the admission of testimony of so vague and indefinite a character.

* * *

No facts are adduced in support of plaintiff's opinion. It is hard to imagine a case where profits could be more justly characterized as speculative and uncertain."

In *Brent v. Thornton*, 106 Fed. 35-37 (Cir. Ct., 5th Cir.), concerning the "testimony of the defendant in error H. H. Thornton which the plaintiff in error moved to have stricken out on the trial," the Court said:

"This testimony the plaintiff in error moved to strike out on the ground that it was uncertain and speculative; that the \$375 which it was claimed that the Monarch would have earned by assisting in pulling off such vessel was uncertain, and speculative, and too remote.

* * *

Opinion testimony as to the probability of employment, and the amount of the earnings if employed, is

too speculative and contingent to be the foundation of any rule of damages.”

D'Ole v. Kansas City Star Co., 94 Fed. 840, 841 (Cir. Ct., W. D. Missouri):

“He never sold a single copy of the pamphlet, nor even offered it for sale. He had never, prior to this publication in the *Star*, had any estimation made by any publishing house or merchant, or other person, as to any terms upon which they would undertake its sale. And the only evidence offered at this trial in respect of its commercial value is his statement and that of one other witness to the effect that they thought it could be sold by some business house to persons who might desire to have their photographs taken, or to other photographers, * * * From which it is quite apparent that any estimation the court could place upon its value would be highly speculative. Furthermore, how could the court, with any degree of required certainty, justifying the assignment of damages against the defendant, determine what damage resulted to the plaintiff from such publication in this newspaper? The plaintiff did not distribute, or attempt to distribute, or sell, a single copy of this pamphlet after the publication in the newspaper, to enable the court by comparison to determine in the remotest degree how the commercial value of his pamphlet was affected by such publication. He could not, without such test or effort, content himself by simply saying that he assumed that his exclusive property in the pamphlet was injured by the newspaper publication, and that it would be useless for him to make the effort to dispose of his pamphlet. Such a method of constituting a basis for the assessment of damages would be too easy for the plaintiff, and would certainly be a very unsafe criterion for the court to recognize in assessing such damages.”

Johnson v. Levy, 3 Cal. App. 591, 596 (86 Pac. 810):

“The evidence touching damages lacks every element of certainty. It consists solely of the guess or reasons for the guess. Both the direct and cross examinations of the plaintiff, and even this is not supported by data or particulars, demonstrate that he had no personal knowledge upon which to base an estimate, and the information derived from others was of the most general and indefinite character.

It is well settled that such evidence will not support a finding as to damages. (*Hayes v. Windsor*, 130 Cal. 235 [62 Pac. 395]).”

Page 74. Under the statement “there are many cases where federal courts have awarded judgment for damages in copyright infringement or kindred matters predicated upon the plaintiff’s own testimony,” plaintiff cites three cases, viz.:

(1) *Atlantic Monthly Company v. Post Publishing Company*, 27 Fed. (2d) 556. Plaintiff establishes by competent factual proof, the actual loss suffered by plaintiff’s going business.

(2) *Paramount Productions v. Smith*, 91 Fed. (2d) 863, 867. Plaintiff established by competent factual proof, the actual value of plaintiff’s story both with and without screen credit, which this Court said (p. 867) was “sufficient as a gauge for the measure of damages.”

(3) *Detective Comics, Inc. v. Bruns Publications*, 28 Fed. Supp. 399. There is nothing in the decision in this case evidencing that plaintiff gave any testimony on damages. Furthermore, the award was not of actual but statutory damages (p. 401), “which I have fixed under Section 25 (b) of the Copyright Act, 17 U. S. C. A. Sec. 25 (b), at fifteen hundred dollars (\$1500).”

Pages 75-82. Under Point III (C) plaintiff cites a number of authorities promulgating the rule that expert testi-

mony can be used to prove the value of property, which is subject to the axiomatic limitation that such testimony must have a factual basis. (See Point III of defendant Universal's Opening Brief.)

Thus, as is said in *32 Corpus Juris Secundum, Evidence*, Secs. 521, 522 (pp. 219, 220):

"The party offering an expert is at liberty to reinforce his judgment, even before any attempt is made to discredit or impeach it, by showing the grounds on which it is based, provided such facts are relevant and admissible for the purpose; but facts so stated do not become evidence in the case. Where the evidence does not disclose the existence of sufficient data on which to base a reasonable judgment, the opinion is incompetent.

* * *

While absolute certainty is not required of an expert, it is necessary that the facts on which an expert relies for his opinion should afford a reasonably accurate basis for his conclusions. Accordingly, no matter how skilled or experienced the witness may be, he will not be permitted to guess or to state a judgment based on mere conjecture; in other words, the factual foundation for the expert opinion must not be nebulous."

Plaintiff cites *Sheldon v. Metro-Goldwyn Pictures Corporation*, 106 Fed. (2d) 45, aff'd 309 U. S. 390 (60 Sup. Ct. 681, 84 L. Ed. 825), which case involved the apportionment of profits. That this decision was not intended to affect the established rule of law regarding expert testimony on damages, is evidenced by the pertinent decisions of the Supreme Court shortly prior and subsequent to the *Sheldon* case, viz.:

U. S. v. Safety Car Heating Co., 297 U. S. 88, 98 (56 Sup. Ct. 353, 80 Law Ed. 500):

"In the second place, a claim for damages like one for an infringer's profits is too contingent and un-

certain to have a determinable market value when the validity of the patent is unsettled and contested and the factors making up the damage are arrived at by conjecture. *Sinclair Refining Co. v. Jenkins Petroleum Co.*, 289 U. S. 689, 697.”

Connecticut Ry. Co. v. Palmer, 305 U. S. 493, 505 (59 Sup. Ct. 316, 83 Law. Ed. 309):

“It is well understood that such evidence must show damages to reasonable certainty. Mere ‘plausible anticipation’ does not merit consideration nor are flights into the realm of pure speculation entitled to be treated as evidence. The determination of the amount to be allowed as the damage will be based on evidence which satisfies the mind.”

Union Pacific Railroad Co. v. United States, 313 U. S. 450, 474 (61 Sup. Ct. 1064, 85 Law. Ed. 1453):

“When enough evidence is offered to justify a conclusion based upon judgment and not guesswork, the requirements of the judicial process are met. Cf. *Palmer v. Connecticut Ry. & Lighting Co.*, 311 U. S. 544, 559, and cases cited.”

Pages 82-86. Under Point III (D) plaintiff cites a number of cases to the effect that intrinsic value of property may be shown where market value does not exist. Thus plaintiff attempts to circumvent the Court’s ruling that Lloyd’s testimony actually established that such rights had “a market value” (Tr. pp. 107, 108).

As was said in *Dayton Power & Light Co. v. Public Utilities Commission of Ohio*, 292 U. S. 290, 298, 299, 300, (54 Sup. Ct. 647, 78 L. Ed. 1267):

“As to that issue the burden of proof rests heavily on the appellant. *Los Angeles Gas & Electric Corp. v. Railroad Commission of California*, 289 U. S. 287, 304, 305. In the endeavor to sustain it there has been an attempt to establish market and intrinsic

values by the estimates of experts as well as by actual sales.

* * * Variations so wide are sufficient of themselves to disprove the existence of a market in the strict or proper sense. *Sinclair Refining Co. v. Jenkins Petroleum Process Co.*, 289 U. S. 689, 697, 698, 699. * * *

The appellant has attempted to correct these uncertainties by supplementing the opinions of its experts with testimony of actual sales. But they were sporadic transactions, separate in time and space, and at prices too disparate to supply a helpful test of value."

The difficulty with plaintiff's position is, that the intrinsic value of the rights to plaintiff's picture, i. e., the profits which plaintiff or someone else might make if the picture was ever re-issued or re-made, was not established.

Pages 87-89, Point III (E). This is answered under I (10) of this brief.

Pages 90-92, Point III (F). This is answered under I (7) of this brief.

Pages 93-96, Point IV (A). Plaintiff relies upon the decision of this Court in *Harold Lloyd Corporation v. Witwer*, 65 Fed. (2d) 1, to the effect that a party calling an officer of an adverse party vouches for his credibility. This decision was rendered on April 10, 1933. However, Rule 43 (b) Fed. Rules Civ. Proc. (effective January 3, 1938) provides to the contrary:

"A party may call an adverse party or an officer, director, or managing agent of a public or private corporation or of a partnership or association which is an adverse party, and interrogate him by leading questions and contradict and impeach him in all respects as if he had been called by the adverse party
* * *."

Pages 96-98, Point IV (B). This is answered under I (9) of this brief. As to the contention that defendant

could not impeach Lloyd, the president of plaintiff corporation, see defendant's answer to Point IV (A), *supra*.

Pages 99-104. Points V (A) and (B). This is answered under I (2), (3) and (4) of this brief and Point VII, A, B, C and D of defendant Universal's Opening Brief.

Plaintiff says (p. 102) that the equitable defense of laches cannot be interposed in an action at law. The complaint contains two alleged causes of action. They are in substance the same, although under the first cause of action plaintiff demands legal relief and under the second cause of action equitable relief. Assuming, however, that this is an action at law, the equitable defense of laches may nevertheless be interposed.

28 U. S. C., Sec. 398 (Mar. 3, 1915, ch. 90, 38 Stat. 956), under the heading "Equitable defenses and equitable relief in actions at law," provides in part:

"In all actions at law equitable defenses may be interposed by answer, plea or replication without the necessity of filing a bill on the equity side of the Court."

Under the purview of this Section the equitable defense of laches can be interposed in any action at law.

Banker v. Ford Motor Co., 69 Fed. (2d) 665, 666 (Cir. Ct., 3rd Cir.):

"Had the appellant's suit been in equity, the evidence would have been ample for holding that recovery was barred because of laches. * * *

The appellant admits the authority of the cited cases if applied in equity, but contends that they are inapplicable to actions at law. But that contention is met by section 274b of the Judicial Code (28 USCA, § 398), * * *

The above-quoted section in terms authorizes equitable defenses in actions at law theretofore applicable

only in equity. *Ford v. Huff* (C. C. A.), 296 F. 652, certiorari denied 266 U. S. 602, 45 S. Ct. 90, 69 L. Ed. 462.”

To the same effect:

Ford v. Huff, 296 Fed. 652, 657, 658 (Cir. Ct., 5th Cir.), cert. den. 266 U. S. 602 (45 Sup. Ct. 90, 69 L. Ed. 462);

Universal Coin Lock Co. v. American Sanitary Lock Co., 104 Fed. (2d) 781, 782, 783;

Dovel v. Sloss-Sheffield Steel & Iron Co., 139 Fed. (2d) 36, 38 (Cir. Ct., 5th Cir.), cert. den. 322 U. S. 740 (64 Sup. Ct. 1057, 88 L. Ed. 1573);

Mather v. Ford Motor Co., 40 Fed. Supp. 589, 591, 592.

Conclusion

See Conclusion (p. 78) Opening Brief For Appellant and Cross-Appellee Universal Pictures Company, Inc.

Respectfully submitted,

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No. 11,286

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

UNIVERSAL PICTURES COMPANY, INC., a Delaware corporation, and CLYDE BRUCKMAN,

Appellants,

vs.

HAROLD LLOYD CORPORATION, a California corporation,

Appellee.

Appellee's Petition for Modification of Opinion and Judgment to Include Appellee's Attorney's Fees Upon Appeal.

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JUN -7 1947

PAUL P. O'BRIEN,
CLERK

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Appellants,

vs.

HAROLD LLOYD CORPORATION, a California corporation,
Appellee.

**Appellee's Petition for Modification of Opinion and
Judgment to Include Appellee's Attorney's Fees
Upon Appeal.**

*To the Honorable Judges of the United States Circuit
Court of Appeals for the Ninth Circuit:*

Now comes appellee Harold Lloyd Corporation and respectfully petitions the Court to modify its opinion and judgment rendered May 12, 1947, so as to include an allowance of counsel fees to appellee as part of appellee's costs upon appeal, and as grounds therefor and in support thereof your petitioner alleges the following:

**The Only Point Left Undetermined by the Opinion
of the Circuit Court Is Appellee's Application for
Counsel Fees Upon Appeal.**

Application was duly and timely made by your petitioner in its brief filed October 30, 1946, that appellee's counsel fees should be "awarded to plaintiff's attorney as part of

plaintiff's costs on appeal." (Brief for Appellee Harold Lloyd Corporation, p. 109.)

Both appellants contended "There should be no award to plaintiff of attorneys' fees." (Appellant Universal's Opening Brief, p. 78; and Appellant Bruckman's Opening Brief, p. 73.) As we read appellants' briefs, however, there was no contention by either appellant that in the event the judgment should be *affirmed* plaintiff-appellee would not be entitled to an award of attorneys' fees as part of its costs.

The Opinion of this Court rendered May 12, 1947, is silent, however, as to an allowance of appellee's counsel fees upon appeal. The authorities hereinafter cited support such allowance.

As "The Prevailing Party" Appellee Is Entitled to Its Counsel Fees Upon Appeal in Addition to Its Costs and Attorneys' Fees in the Trial Court.

Section 40 of the Copyright Act of 1909, as amended, expressly provides that in actions for copyright infringement "the court may award to the prevailing party a reasonable attorney's fee as part of the costs" (March 4, 1909, c. 320, Sec. 40, 1935 Stats. 1084, 17 U. S. C. A. 166).

The judgment of the trial court (affirmed in this Court) expressly provided that plaintiff Harold Lloyd Corporation recover \$10,000 "as part of its costs" "as and for plaintiff's attorneys' fees incurred in the preparation, prosecution and trial of this action." [Clk. Tr. p. 43.] This allowance of counsel fees in the trial court was expressly restricted, however, to services rendered by plaintiff's counsel in the preparation and trial of the lawsuit and for *services rendered prior to the judgment* dated

January 8, 1946. [See Finding of Fact "XIV," Clk. Tr. p. 37; and Conclusion of Law "V," Clk. Tr. p. 39.]

Since February 6, 1946, appellee's counsel has labored diligently in the preparation of its defense to the appeals taken by appellants Universal Picture Company, Inc., and Clyde Bruckman.

Appellant Universal's Opening Brief and 25-page Appendix consisted of 25 main and subsidiary points and cited 122 cases. Appellant Bruckman's Opening Brief and Appendix consisted of 27 main and subsidiary points and cited or quoted from 36 cases and 8 textbooks.

The preparation of Appellee's Brief required a comprehensive and exhaustive study of all decided copyright cases in this country and in England, as well as analysis of all British and American copyright statutes. Although Appellee's Brief as finally filed in this Court consists of only 6 main points and 15 subsidiary points with quotations from or citations of 120 leading cases and 12 textbooks, many additional hundreds of authorities were consulted, digested and analyzed before our brief was reduced to the form and content in which it was finally filed.

Appellee's attorney, Harold A. Fendler, and two additional attorneys employed by appellee's counsel whose names do not appear on the brief, expended virtually their full time for a period of nearly three months (actually requiring more than 770 hours) in the preparation of Appellee's Brief herein. For these services, appellee submits a reasonable counsel fee to be awarded as part of its costs upon appeal is the sum of \$7,500.00.

As stated by Ball, "*The Law of Copyright and Literary Property*," at page 642:

"In copyright cases, a large part of the expense of litigation is thrown on the unsuccessful party."

In *Nichols v. Universal Pictures Corporation*, 45 F. (2d) 119, the Second Circuit Court of Appeals expressly held that the prevailing party was entitled to a reasonable attorneys' fee.

In *Sheldon v. Metro-Goldwyn Pictures Corp. et al.*, 106 F. (2d) 45, the Second Circuit Court of Appeals allowed \$5,000.00 to plaintiff's counsel for their services upon the first appeal wherein plaintiff was "the prevailing party." This sum was *in addition* to an allowance of \$10,000.00 for plaintiff's counsel fees in connection with the trial.

This Court will take judicial notice of the fact that the dollar value is at least 50% less at the present time than when the *Sheldon* case was decided. (See *O'Meara v. Haiden*, 204 Cal. 354, 367.)

See, also:

Lewys v. O'Neil, 49 F. (2d) 603 (where an aggregate allowance of \$17,500 counsel fees was made for services solely in the trial court);

General Drafting Co. v. Andrews (2 C. C. A.), 37 F. (2d) 54 (where \$2,000 damages was held adequate but \$4,000 counsel fees was allowed for work of plaintiff's counsel in preparing the case for trial and on appeal);

Cory v. Physical Culture Hotel, 14 Fed. Supp. 986, affirmed 88 F. (2d) 411 (where \$2,500 attorneys' fees were allowed in the trial court although total damages aggregated only \$5,000);

Warren v. White and Wyckoff Mfg. Co., 39 F. (2d) 922, 923 (\$1,000 attorneys' fees allowed in the trial court although damages aggregated only \$1,000).

In "The Copyright Law" by Herbert A. Howell, formerly Assistant Register of Copyrights, the following factors are set forth at page 154 as a guide to the Court in fixing the amount of attorneys' fees:

" . . . In making the award the Court gives consideration to the importance of the questions involved, the amount of pecuniary damages, the value of the professional services rendered and the success achieved."

Additional factors to be considered by the Court according to "Amdur—Copyright Law and Practice" (p. 1165) are the "character of the infringement and surrounding circumstances" and the "vigor of the defense."

This Court has unqualifiedly affirmed the judgment of the trial court in its findings of knowing, wilful and *deliberate infringement*. This Court has furthermore rejected each and every fallacious argument so vigorously pressed and re-emphasized by both appellants Universal and Bruckman. The questions involved in the decision were complex and important. The amount of pecuniary damage was large (\$40,000.00). The value of the professional services at only \$10.00 per hour would exceed \$7,500.00.

In view of the deliberate character of the infringement; the distorted and misleading nature of the briefs filed by the defendants on appeal; the exhaustive work required of appellee's counsel; and the final success achieved by appellee, we submit \$7,500.00 is a most reasonable counsel fee to be allowed appellee under all the circumstances of the case.

Conclusion.

Since defendants' infringements were deliberate; since their appeals from the very moderate judgment of the trial court were without merit; since appellee's counsel was required to expend 770 hours in preparation of appellee's brief upon appeal; and since appellee is the prevailing party, appellee should be awarded and allowed as part of its costs upon appeal a counsel fee of \$7,500.00, and the opinion and judgment of this Court rendered May 12, 1947, should be modified accordingly.

Respectfully submitted,

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No. 11286.

IN THE
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UNIVERSAL PICTURES COMPANY, INC., a Delaware Corporation, and CLYDE BRUCKMAN,

Appellants,

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HAROLD LLOYD CORPORATION, a California corporation,

Appellant,

vs.

UNIVERSAL PICTURES COMPANY, INC., a Delaware Corporation, and CLYDE BRUCKMAN,

Appellees.

ANSWER TO PETITION FOR MODIFICATION
AND ALLOWANCE OF ATTORNEYS FEES.

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Appellees.

ANSWER TO PETITION FOR MODIFICATION
AND ALLOWANCE OF ATTORNEYS FEES.

The appellee *and appellant* Harold Lloyd Corporation, in the petition filed herein asking for modification of the opinion and judgment so as to include the fees of its attorney upon the appeal, presents the matter to the court as though there had been but a single appeal and that Harold Lloyd Corporation was before the court only as appellee. So far does the petitioner go in this respect that

